Court of Appeals No. 31738-9-II

Court of Appeals, Division II of the State of Washington

In re the Matter of JOSEPH KWIATKOWSKI, Appellant,
v.
RALPH DREWS, JAMES FROST, SEATTLE FIRST NATIONAL BANK (BANK OF AMERICA), PUGET SOUND NATIONAL BANK (KEY TRUST COMPANY) and U.S. BANK TRUST DEPARTMENT, Respondents.

Brief of Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

I. INTRODUCTION

Timeline. The facts of the case are complex - two guardians of the person, four guardians of the estate, and special administrators running Great American Herb Company ("GAHC") during the course of the guardianship. Due to factual complexity and newly discovered evidence, a timeline with citation to the Clerk's Papers is attached at Appendix "1".

Background. Joe Kwiatkowski and his wife Jana were vacationing in New Zealand in 1986 when they were in a car accident. Three people died in the accident including Joe's wife. Joe suffered extensive head injuries and was treated in New Zealand from April 1986 until July 1986 before returning to the United States. Having no children, Joe was left to deal with the loss of his wife as well as a lengthy recovery spanning over a fourteen years.

Joe and Jana had worked hard to build a successful business, GAHC. The company had grown through Joe's and Jana's persistence and dedication. Joe and Jana left James Frost & Ralph Drews ("FD") as attorneys-in-fact with powers of attorney for their business accounts while they were on vacation. Arthur Davies was the Kwiatkowskis' personal attorney and petitioned the court for Jana's probate and Joe's guardianship. FD continued in their role as Certified Public Accountants and were appointed Special Administrators ("Special Ad").

II. ASSIGNMENTS OF ERROR

1. The court erred by entering summary judgment for Frost & Drews in the order filed April 21, 2004.

2. The court erred by entering the April 20, 2004 order denying Joe's motion to set aside the August 15, 1997 order dismissing Frost & Drews, and for a full accounting.

3. The court erred by entering summary judgment for Bank of America in the order filed June 4, 2004, and revised November 2, 2006.

4. The court erred by entering summary judgment for Key Trust in the order filed June 4, 2004, and revised November 2, 2006.

5. The court erred by entering summary judgment for U.S. Bank in the order filed June 14, 2004.

6. The court erred in entering the June 14, 2004 order denying Joe's Motion for Order to Set Aside Orders concerning Bank of America, Key Trust, and U.S. Bank.

7. The court erred by entering U.S. Bank's Order Denying Mr. Kwiatkowski's Motions for Reconsideration, the Findings of Fact and Order Awarding U.S. Bank's Attorney's Fees and Costs, filed January 11, 2006.

8. The court erred by entering judgment and granting Bank of America's Findings of Fact and Order Awarding Attorney's Fees and Costs of $65,823.98, dated May 19, 2006.

9. The court erred by entering judgment and granting Key Trust's Order Awarding Attorney's Fees and Costs to Key Trust Company of $32,198.08, dated May 19, 2006.

10. The court erred in entering the Order Denying Complainant's Motion to Amend Complaint and Add Parties to Respondents' Caption, on June 9, 2006.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Due to the complexity of the facts, there is a summary provided with the issues. All facts are cited elsewhere with Clerk's Papers reference.

FROST & DREWS ("FD") AS SPECIAL ADMINISTRATORS FROM 1986-1997 IN PROBATE AND GUARDIANSHIP

Contemporaneous with the appointment of the Personal Representatives, FD were appointed as Special Ad in the probate to operate GAHC. FD filed a report in Jana's probate, but did not obtain an order of approval. FD obtained an April 12, 1990 order in the guardianship - no petition or report were filed. In 1991, FD were required to report quarterly to the guardian of the estate and the GAL, John Parr. They did not report to Parr and may have reported to the Banks which was not discovered until 2005. On August 15, 1997, a first report was filed and second order was entered ex parte approving their first report.

1. Did the duties and authority allocated to FD exceed those authorized by RCW 11.32.030?

2. Were FD de facto guardians?

3. Did FD's accountings fail to meet the requirements of RCW 11.32.060 and RCW 11.92.040?

4. Did FD fail to disclose financial data and their fees to the court and the GAL?

BANK OF AMERICA, formerly Seattle First National Bank ("BOA")

BOA was appointed Co-Personal Representative of Jana's probate and guardian of Joe's estate in 1986. BOA stated repeatedly that they were not managing the business, and received no financial statements regarding GAHC. The final accounting was entered ex parte, incorporating as a condition of its resignation a release. In 2005, newly discovered evidence showed that BOA had not disclosed to the court or GAL the extent to which it was involved in and knew of GAHC's corporate operation.

5. Is a waiver of notice on a final accounting valid?

6. Is BOA able to condition their resignation on a release signed by: Joe, who is incapacitated; the Guardian ad Litem ("GAL"); Drews, as limited guardian of Joe's person; and the Special Ad, each without court ordered approval? Did the fiduciaries exceed their authority by executing a release to BOA? If the release is applicable to Joe, were SPR 98.16W and RCW 11.92.060 followed? If not, is the release valid?

7. Did BOA follow the necessary procedure in changing the scope of the guardianship?

KEY TRUST COMPANY ("KEY")

KEY was appointed guardian of the estate following BOA in 1991. KEY accepted stock of GAHC. KEY filed two accounting reports. KEY was subject to a 1991 court order requiring the Special Ad report to KEY and the GAL regarding GAHC, but they never did. KEY's discharge was deliberately retroactive, creating a five month gap between guardians. Joe was involved in incorporating a new business, Sirius Development, without court approval. In 2005 it was discovered that KEY approved a loan guarantee to Key Bank for $500,000 which was not reported to the court or GAL.

8. Did KEY fail to disclose material facts to the court and GAL Parr when they executed an unauthorized guaranty in favor of Key Bank, subjecting the guardianship estate to liability? Did that failure prevent KEY's interim and final orders from being final and binding?

9. If KEY accepted the stock of GAHC, can they avoid responsibility for reporting and monitoring it despite the 1991 court order?

U.S. BANK ("USB")

USB was appointed in 1994 as the third successor guardian of Joe's estate. USB received an order of discharge for its third, and fourth and final reports in 1997; however, the third report was never filed, and the fourth report was not filed until 2002. USB indicated in its accountings that it received no financial statements for GAHC and is not accountable for its operations. USB had financial statements, but did not fully report to the court or GAL. USB did not marshal or report on Sirius Development.

10. If USB secured orders indicating it was not responsible for management of GAHC based on its representation that it did not have financial statements, is this limitation effective if in fact USB did have financial statements?

11. Are the conditions of USB's discharge met?

12. Is an order of discharge valid when it is filed five years before the reports it allegedly approves?

13. Did the change in USB's status from limited guardian to custodian relieve it of reporting requirements during the time USB controlled funds as custodian?

14. Did USB have a duty to marshal all assets? If so, if they failed to marshal, report and fully disclose Joe's interest in SD, did they breach their fiduciary duty and render the orders granted void?

IDENTICAL ISSUES PERTAINING TO FROST AND DREWS, BANK OF AMERICA, KEY TRUST COMPANY, AND U.S. BANK

15. Did FD, BOA, KEY, and USB provide necessary notice with regard to their reports and the presentation of their orders of discharge?

16. Are ex parte orders entered on final accountings void?

17. Was there an "utter disregard" of statutory procedure by FD, BOA, KEY, and USB with regard to notice, reporting, accountings, and discharge, particularly in connection with their final reports and discharge, that resulted in the court acting outside its jurisdiction and rendering its orders of approval void?

18. Did FD, BOA, KEY, and USB fail to fulfill their duties as fiduciaries?

19. Are Joe's claims against FD, BOA, KEY, and USB timely because there has been an entry of void orders, which would not have started the statute of limitations to run?

20. Did FD, BOA, KEY, and USB fail to disclose material facts to Joe,

the GAL, and the court regarding GAHC? If so, does this prevent the GAL's approval of interim or final reports from becoming res judicata and binding on Joe?

21. Are FD's, BOA's, and USB's limitations of liability in their orders effective?

22. Do the above failures allow the court to enter a summary judgment order based on statute of limitations in this matter?

IDENTICAL ISSUES PERTAINING TO BANK OF AMERICA, KEY TRUST COMPANY, U.S. BANK

23. Did the orders relieving BOA, KEY, and USB from responsibility of managing GAHC relieve BOA, KEY, and USB from the general duty to monitor and report to the court on GAHC?

24. Did BOA, KEY, and USB have a duty to disclose the Special Ad's failure to properly report on Joe's interest in GAHC?

RALPH DREWS ("DREWS")

25. Can summary judgment be granted where there is no order approving a final accounting and when the guardian has failed to fulfill his responsibilities under previous orders of the court?

26. Has Drews yet to be discharged as limited guardian of the estate?

GUARDIAN AD LITEM PARR ("GAL")

27. If a GAL fails to adequately investigate and/or is not informed of material facts, should his reporting and approval of interim and final orders be res judicata, bind the incapacitated person, and effectively cut off all of Joe's legal claims?

SETTLEMENT AGREEMENT ("SA")

Joe entered into a SA to avoid paying attorney fees incurred by the Banks on summary judgment motions. The Banks' involvement and knowledge about his business was not fully disclosed in the court file. Joe discovered new facts, so he filed a motion for continuance and for discovery. The

court granted limited discovery into Bank attorneys' files. Production of documents revealed undisclosed important information in Bank counsels' files never disclosed to the court or GAL.

28. Was the insertion of an "as-is" clause in the SA effective as to Joe when he relied on the court file, reasonably assumed that all information in the court file was correct, and the Banks were fiduciaries at the time they collected the undisclosed information?

29. Does the fact that Joe has capacity now cut off his ability to rely on the Banks' previous fiduciary status and what they reported to the court?

30. Is it proper for a court to rule that there is no need for an evidentiary hearing where the documents produced on their face reveal a failure to disclose on the part of the Banks that would render the SA void?

31. If those documents are not substantive on their face and raise unresolved issues of material fact, is an evidentiary hearing proper?

DISCOVERY DOCTRINE

32. Does RCW 11.92.053 bar Joe's claims when issues of material fact were discovered in 2005 concerning information that was not disclosed to the court or GAL which was in the possession of the fiduciaries during their tenure as court appointed fiduciaries?

AMENDED COMPLAINT

33. Did the trial court abuse its discretion by denying Joe's motion to amend that was based on the previously undisclosed evidence pursuant to the discovery doctrine and CR 15(a)?

ATTORNEYS' FEES

34. Did the trial court abuse its discretion when it awarded attorney fees to the Banks on the summary judgment motions based on RCW 11.96A.150?

35. Were the fees awarded to BOA, KEY, and USB proper according to RCW 11.96A.150 on the settlement agreement issue? Were the amount of fees granted reasonable and were the hourly rates of USB and BOA reasonable?

36. Should Joe be awarded his fees in for the summary judgments, motions to set aside, SA and on appeal?

JUDGE

37. If the case is remanded, should a new judge be assigned to the case because of the lack of appearance of fairness as noted by her comments and rulings?

IV. STATEMENT OF THE CASE

Guardianship/Guardian of Person. In December 1986, Joe's half-brother Marek Perelmuter was appointed limited guardian of the person "for the purpose of making residential and medical decisions." The letters of guardianship confirmed the "limited" guardianship of the person. CP 2656. The successor limited guardian of person was Drews appointed December 1989. CP 293-295. The limited guardianship of the person was removed August 15, 1997. CP 395-399. Removing the guardianship to Joe's person returned his rights to manage his own personal, residential, and medical decisions.

Guardianship/Guardian of Estate. The first guardian of Joe's estate was BOA, appointed December 8, 1986.[1] The letters of guardianship

[1] CP 6-8. The order appointing the guardians was titled "Order Appointing Limited Guardians". The order limited the guardianship of the person; however, it did not limit the guardianship with regard to the estate.

confirmed the unlimited or full guardianship of the estate as did the oath.[2] During the guardianship, three successor guardians of the estate were appointed: KEY, USB and Drews.[3]

FD were appointed Special Ad in the probate of Jana to operate the Kwiatkowski's business, GAHC. CP 244-246. FD continued as Special Ad of GAHC in Joe's guardianship once Jana's probate closed. CP 278-288. GAHC represented the most valuable asset in both Jana's probate and Joe's guardianship. According to BOA, GAHC stock reached market values in excess of nineteen million dollars. CP 9-10.

Joe's status as an incapacitated person made his future dependent upon the court appointed fiduciaries protecting his personal and financial interests.[4] Joe's guardianship of the estate became truly limited in 1997, when Drews was appointed as limited guardian of the estate. CP 377-386. Until the guardianship of Joe's estate fully terminated January 26, 2001, Joe only controlled his finances to the extent set forth by the Order Making Changes in Guardianship entered in 1997. CP 395-399.

Civil Action. Once Joe regained his capacity in 2001, he was concerned about the status of his business during the time he was incapacitated. The problematic nature of the fiduciaries' lack of

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[2] CP 2656, 2655.
[3] CP 329-331, 113-115, 373-376.
[4] In re Guardianship of Karan, 110 Wn. App. 76, 85, 38 P.3d 396 (2002).

accounting for GAHC led him to request information from the Banks and FD multiple times. CP 213-221. His requests were ignored and the civil suit was filed to force a proper accounting of his estate.[5]

In the civil case, Joe plead breach of fiduciary duty, conflicts of interest and negligence against fiduciaries FD, BOA, KEY and USB. CP 213-221. In March 2004, FD and Drews filed a motion for summary judgment, and in response, Joe's attorney filed a motion to set aside the order of discharge of FD and Drews and for an order requiring an accounting. CP 508-534. The court granted FD and Drews' summary judgment and denied the motion to set aside.[6] The court strictly construed the statute, we assume RCW 11.92.053, and granted FD summary judgment based on expiration of the statute of limitations. CP 242-243.

BOA, KEY and USB filed motions for summary judgment, and Joe's counsel, Donna Holt, filed a motion and memorandum of law to set aside the orders discharging guardians BOA, KEY and USB, and requiring a full accounting.[7] Ultimately, in June of 2004, summary judgment was granted in favor of BOA, KEY and USB on the basis of statute of limitations, notice, and hold harmless language in their orders.[8]

A motion for discretionary review of Special Ad FD's and Drews'

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[5] CP 168-175, 1028-1031, 1351-1365, 2895-2896.
[6] CP 204-205, 242-243.
[7] CP 2897-2899.
[8] CP 736-737, 738-740, 753-756, 898, 914, 917, 918, 924-926

summary judgment, and the order denying Joe's motion to set aside the order discharging FD was filed. CP 206. That motion was granted and the case stayed pending an outcome with regard to the remaining parties.[9]

Settlement Agreement. After losing on summary judgment to the Banks, Joe began negotiating a SA to avoid paying the Banks' legal fees. CP 788-790. However, Joe's new appellate counsel discovered new facts in 2005 and contacted the Banks asking them to wait on completing the SA.[10] The Banks in turn filed a motion to enforce the SA. Joe raised a number of defenses to the SA including misrepresentation and innocent misrepresentation. As a result of several newly discovered documents, Joe's counsel moved for a continuance and a motion for production of records. The court granted the continuance and only allowed the production of Bank counsels' files located at Bank counsels' offices. CP 1366-1369. As a result of this discovery, important new documents were disclosed.[11] Joe filed pleadings discussing each of the documents discovered and their importance in connection with his guardianship case. These statements of irregularities were filed in the summer of 2005.[12]

In November 2005, the court orally granted USB's motion to

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[9] CP 3031.

[10] CP 1964-1965. Appendix "1" titled "Timeline" sets forth a chronology of the newly discovered evidence and history of the probate, guardianship and civil matters.

[11] Appendix "1" pages 1-7 sets forth the newly discovered evidence.

[12] The statements of irregularities detail the importance of the newly discovered evidence. CP 1121-1223, 1224-1274, 1032-1120.

enforce the SA based on its satisfaction with USB's responses in regard to the irregularities. CP 1660-1665. The matter continued as to BOA and KEY and the court ruled there would be an evidentiary hearing.[13] Later, the issue of Guardian ad Litem John Parr's ("GAL") file arose with BOA insisting that Parr knew about the $500,000 in fees expended to Drews and Davies in 1986-1987. CP 70-71. The court ordered that the file of Parr be produced; that Parr be deposed; and if Parr knew of the approximately $500,000 in fees, the court would sign BOA's order enforcing the SA.[14]

The deposition confirmed Parr had no knowledge of the fees. CP 2036-2037. However, the court enforced the SA based on a lack of pursuit of previously ordered discovery of the Owens Davies file by Holt, Joe's attorney. CP 2543-2548. Therefore, the evidentiary hearing was canceled and BOA's and KEY's motion to enforce the SA was granted. CP 2543-2547. As a result of the newly discovered evidence, Joe filed a motion to amend the complaint in the civil matter adding additional legal theories and parties 'Arthur Davies' and 'Owens Davies, P.S.'. CP 2145-2178. The motion to amend was denied. CP 2553-2556.

The thrust of Joe's claim is that over a period of years the Banks submitted reports and orders to the court for approval concerning Joe's

[13] RP, November 7, 2005 Superior Court Proceedings, page 62.
[14] CP 1734, 1737, 2233-2234.

interests in the GAHC that constituted the bulk of the guardianship estate without disclosing to the court all material information in their possession, including reporting the Special Ad's failure to report to them as ordered, and failing to disclose unauthorized transactions. CP 213-221.

On November 2, 2006, the parties returned to the trial court on the issue of designating the documents considered on the summary judgment motions of BOA and KEY. The court stated it did not review the court file prior to ruling on the summary judgments of the fiduciaries.[15]

V. ARGUMENT

The Fiduciaries. The requirement that a fiduciary act in the best interests of the principal is compromised when a fiduciary is allied with multiple parties with competing interests and fails to operate independently. "A guardianship is a trust relationship of the most sacred character."[16] Here, Joe's interests were affected by the fiduciaries acting in multiple roles.

FD were CPA's for GAHC prior to the guardianship. FD were appointed Special Ad of GAHC in Jana's probate and continued as Special Ad in the guardianship.[17]

Drews was one of the CPA's of GAHC originally and elected to

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[15] RP, November 2, 2006 Superior Court Proceedings, page 11.
[16] In re Eisenberg, 43 Wn. App. 761, 766, 719 P.2d 187 (1986) (citing 39 Am. Jur. 2d, Guardian and Ward § 1, (1968)).
[17] CP 578, 244-246, 616-620.

the Board of Directors in 1986. Along with Frost, Drews was appointed Special Ad of GAHC and continued in that role with Frost. Drews was also appointed limited guardian of the person for Joe and limited guardian of the estate from 1997-2001.[18]

Davies was Joe and Jana's personal attorney in 1984 and elected to the Board of Directors for GAHC in 1986. During the course of the probate and guardianship, Davies represented the Special Ad, GAHC, BOA, KEY, USB and Drews.[19]

Parr was appointed guardian ad litem ("GAL") to investigate the necessity of a guardian for Joe and then later appointed in Jana's probate to investigate the final report of the personal representatives and actions of the Special Ad. Parr continued as GAL in the guardianship until August 1997.[20]

BOA was appointed Co-Personal Representative in Jana's probate and guardian of Joe's estate in 1986.[21]

Fiduciaries Distributed Duties of Management. Fiduciaries such as Special Ad and guardians are held to a heightened standard of care when

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[18] CP 975-976, 244-246, 293-295, 377-386.
[19] CP 161, 244-246, 278-288, 6-8, 18-32, 24-31, 11-17, 322-328, 329-331, 348-350, 351-352, 113-115, 362-365, 370-372, 407-463, 1805-1816, 975-976, 605-613, 101, 606, 395. Appendix "2" is a chart of Davies' representation with CP cites and corresponding years.
[20] CP 600, 393-394.
[21] CP 244-246, 6-8.

handling the property of an incapacitated person.[22] Here, fiduciaries attempted to distribute the responsibility of managing GAHC with releases and language exonerating themselves.[23] However, the duty of a guardian to monitor and report to the court on assets in a guardianship cannot be relinquished by agreement of the parties.[24]

Here, the fiduciaries failed in multiple ways related to accountings, following court orders, and reporting to the court. A guardian's duty is to protect and preserve the estate and a guardian cannot change its duties without a show cause proceeding.[25] The Special Ad and Banks are attempting to argue an aberration from normal guardianship law. That being, the Banks were not responsible for monitoring and reporting on GAHC, the major asset of Joe's estate and the Special Ad failures regarding GAHC.[26]

The burden is on the Special Ad and guardian Banks to show why they were immune from the normal requirements of the guardianship statutes, accounting requirements, and reporting responsibilities characteristic and fundamental to their statutory fiduciary role.

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[22] Eisenberg, 43 Wn. App. at 766.
[22] In re Carlson, 162 Wash. 20, 28, 297 P. 764 (1931).
[23] CP 293-295, 300-302, 309-319, 362-365, 370-372, 387-390, 18-23, 162-165.
[24] Carlson, 162 Wash. at 28 (cannot shift duties to others).
[25] RCW 11.92.040(4); RCW 11.88.120; SeaFirst Nat'l Bank v. Brommers 89 Wn.2d 190, 200, 570 P.2d 1035 (1977).
[26] United Pac. Ins. Co. v. Buchanan, 56 Wn. App. 371, 376-77, 783 P. 2d 1089 (1989) (joint-guardians are jointly responsible for joint accounts if aided, conceived in, or contributed to).

Special Administrators/Frost & Drews. RCW 11.32, the Special Ad statute, allows the appointment of a Special Ad to collect and preserve the effects of a decedent.[27] The administrator shall post a bond.[28] Powers and duties of a Special Ad are to collect...assets...debts of a decedent and preserve...for the personal representative...the appointment is for a specified time, to perform duties respecting specific property, and...particular acts, as stated in the order appointing...Special Ad are allowed compensation for services that the court deems reasonable, including attorney's fees.[29] Once letters testamentary are issued, the power of the Special Ad ceases.[30]

Accountants FD started working for GAHC in 1984. CP 578. While the Kwiatkowskis were in New Zealand, FD were responsible for overseeing GAHC and following the car accident, FD were appointed as Special Ad in Jana's probate in 1986 to:

> Operate the corporate business [GAHC], with full powers to borrow money, order inventory, conduct a marketing program and to take whatever action is required for the operation of the business and to do so without bond until further order of this court, the recovery of Joe or the hiring of a full-time interim manager, whichever event occurs first. CP 244-246.

Half the GAHC stock was an asset of the probate estate, and half

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[27] RCW 11.32.010.
[28] RCW 11.32.020.
[29] RCW 11.32.030.
[30] RCW 11.32.040.

was an asset of Joe's guardianship.[31] The Co-Personal Representatives' report references a Special Ad report from the date of Jana's death through December 30, 1987. CP 579. The only report filed by the Special Ad in Jana's probate is filed in 1990, but dated November 30, 1988. CP 605-613. The Report does not include any balance sheets, investment reports, income statements or request for approval of fees. CP 605-613. No order was entered approving it.

The order approving the Co-Personal Representatives' final report does not mention fees paid to FD. CP 616-620. From the order and docket, it is unclear whether the court reviewed any documents from the Special Ad' tenure at the hearing on the final report of Co-Personal Representatives on April 11, 1990.[32]

On April 12, 1990, an ex parte order was entered in the guardianship estate approving a Special Ad's report and transferring FD duties to manage GAHC from the probate to the guardianship. CP 18-23. There is no note of issue, report of proceedings, or Special Ad report in the file. By court order entered March 7, 1991, FD were to report on the financial condition of GAHC quarterly to the GAL and the guardian of the estate. CP 37. There is no evidence in the court file they ever did.

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[31] CP 9-10, 247-249.

[32] CP 616-620. This document is dated April 11, 1990, filed stamped April 13, 1990, and shows up in the docket April 16, 1990.

Statutory Requirements of an Accounting. *Black's Law Dictionary* defines "accounting" as:

> "an act or system of making up or settling accounts; a statement of account, or a debit and credit in financial transactions."[33]

A valid accounting for a business requires income statements, financial statements, balance sheets, and banking records to show exactly what happened during a specific period.[34] The duty to account entails showing the necessity for expenditures and to show they were made.[35]

> Personal Representative. A personal representative is required to produce receipts or canceled checks with expenses and charges ...receipts shall be filed and remain in the court file until the probate has been completed...[36]
>
> Trustee. A trustee is required to deliver, at least annually, a written, itemized statement of all current receipts and disbursements made by the trustee of the funds of the trust...[37]
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> Guardian. A guardian must file annually, within 90 days of the anniversary...appointment, a written, verified account...which shall contain at least...identification of the property at the beginning of the period, additional property received, income earned, expenditures, adjustments and ending balances.[38]
> Special Administrators. Special Ad must render an account, under oath, of...proceedings, in a like manner as other administrators....[39]
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> Each of these statutes requires an itemized accounting of all

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[33] Black's Law Dictionary, 1979.
[34] RCW 11.92.040(2) and (3), See In re Carlson, 162 Wash. 20, 297 P. 764 (1931).
[35] In re Guardianship of Rudonick, 76 Wn.2d 117, 124-125, 456 P.2d 96 (1969).
[36] RCW 11.76.100.
[37] RCW 11.106.020.
[38] RCW 11.92.040(2).
[39] RCW 11.32.060.

money, in and out, debts, adjustments to income and debt, reported annually unless the court orders otherwise. As Special Ad, fiduciaries FD failed to fulfill their duties by accounting annually; reporting quarterly to the GAL and Banks; and responding to Joe's request for an accounting along with his records.[40]

Neither of the two reports, one in the probate and the other in the guardianship, filed by FD during their tenure from 1986 through 1997 detail money collected or money spent over the course of the guardianship as required by fiduciary statutes and case law.[41] The guardian Banks repeatedly state that they did not review any financial statements of FD as Special Ad of GAHC.[42]

Nor did the Special Ad report asset value changes in GAHC even though the stock value was reported changed several times.[43] GAHC was the most valuable asset of guardianship; however, there is only one set of financial statements in the file for GAHC filed in 1990.[44]

Authorization for Frost & Drews' Fees. FD took fees from GAHC for the work they did. CP 162-165. However, there was literally no court oversight of their activities. Special Ad are allowed compensation for

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[40] CP 37, 1028-1031.
[41] A third almost identical report was filed in May 2002. CP 197-200.
[42] CP 11-17, 24-31, 44-95, 354-357, 116-161, 387-390.
[43] CP 9-10, 11-17, 24-31, 293-295, 1210.
[44] CP 2668-2671.

services that the court deems reasonable, including attorney's fees.[45] The court had no opportunity to review FD's fees and determine whether the fees were reasonable and necessary.

FD assert that their 1997 ex parte order discharged them as Special Ad and relieved them of any liability in connection with their duties during the time they served as fiduciaries for Joe. Failure to fully account in a manner as other fiduciary administrators or to obtain court approval for their fees renders the orders they received null and void.[46] FD's arguments are dependent upon conclusory analysis that the two orders are final orders of the court. FD incorrectly attempt to use the court orders as a shield from liability.

Scope of Frost & Drews Authority. The title "special administrators" does not fit within RCW 11.32 et seq. scheme as used in Jana's probate and Joe's guardianship. The statute for Special Ad does not address the circumstances in which FD operated. Typically, Special Ad are appointed in or to operate an estate prior to the appointment of a personal representative.[47] Here attorney Davies presumably chose the title "special administrators" that effectively became a label. The title is form rather than substance.

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[45] RCW 11.32.030.
[46] RCW 11.32.060, 11.32.030, 11.92.040(4).
[47] RCW 11.32.030.

FD were not Special Ad as outlined by the statute because they did not post a bond, render an accounting, receive court approval for their fees, and were not discharged when the personal representatives were appointed.[48] Instead, FD continued to run GAHC making their role in the probate and guardianship akin to a guardian.

The creation of FD as Special Ad and their management role without court oversight was an aberration. Clearly, FD' responsibility and authority exceeded what was contemplated in the Special Ad statute. FD's role and authority within the guardianship rose to the level of a guardian. As a result, FD were de facto guardians.

Frost & Drews as De Facto Guardians. Washington courts recognized that one acting for and on behalf of another party by taking care of the party's finances, collections, and expenditures, may become a quasi or de facto guardian.[49]

> When determined to be such a de facto guardian, the Bouchat court held that "such a guardian is a trustee of the beneficiary's estate" and the guardian is responsible for accountings of the ward's estate…a de facto guardian is subject to all the duties and liabilities of a guardian.[50]

As a fiduciary, a de facto guardian is held to a heightened standard of care with regard to decisions affecting the ward. A de facto guardian is

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[48] RCW 11.32.060, 11.32.030.
[49] In re Guardianship of Bouchat, 11 Wn. App. 369, 372, 522 P.2d 1168 (1974)), review denied, 85 Wn. 2d 1010 (1975).
[50] Id.

subject to all the responsibilities that attach to a legally appointed guardian. A court may hold the de facto guardian responsible for transactions occurring during such a guardianship.[51]

FD acted as de facto guardians; therefore, they are held to a guardian's standards and guardian's statutes. As de facto guardians, they were subject to the same fiduciary duties and reporting obligations as guardians BOA, KEY, USB and Drews. FD were prohibited from profiting from Joe's estate, and should not have received compensation except what the court determined reasonable and proper.[52]

A. Guardianship Law Applicable to the Parties

Summary.[53] Washington courts hold guardians and limited guardians to the highest fiduciary standard. The guardian is, in effect, a trustee as to the incapacitated person,[54] and the guardianship estate consists of a trust fund.[55] The courts may look to analogous trust law[56], which must be construed in reference to the law of guardianships.[57]

The guardian must abide by the laws and must perform the duties

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[51] In Matter of Estate of Logan, 815 P.2d 35, 37 (Idaho App. 1991).
[52] In re Montgomery's Estate, 140 Wash. 51, 53-54, 248 P. 64 (1926).
[53] See, WA Guardianship Law 3d Ed., Treacy (2003), Ch. 5 & 6.
[54] See, e.g., In re King, 151 Wn. 120, 123, 275 P. 82 (1929) ("the guardian is, of course, but a trustee"); Bouchat, 11 Wn. App. at 371-72 (guardian de facto is trustee).
[55] Grady v. Dashiell, 24 Wn.2d 272, 285, 163 P.2d 922 (1945). ("Money or other property held by a guardian for his ward constitutes trust funds").
[56] Eisenberg, 43 Wn. App. at 766 ("analysis of a guardianship question may rely upon an appropriate trust concept").
[57] In re LeFevre, 9 Wn. 2d 145, 157, 113 P.2d 1014 (1941).

set forth in the statutes.[58] A guardianship consists of "a trust relation of the most sacred character,"[59] and the courts "require a more jealous guarding of the interests of such helpless persons than those who are beneficiaries of trusts."[60] The duties of guardians are recognized as burdensome.[61] The fact that the courts will generally heed the guardian's suggestions with respect to the interests of the ward emphasizes the need for the guardian to exercise wise judgment in the administration of the ward's estate.[62]

In marked contrast to probates, guardians and limited guardians are not entitled to "nonintervention" powers. Guardians are "at all times... under the general direction and control of the court making the appointment."[63] Court supervision of guardians and limited guardians is close, and most significant acts require prior court approval.[64]

While guardianship is covered by statute,[65] and the matter of

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[58] See Scott v. Goldman, 82 Wn. App. 1, 917 P.2d 131 (1996).
[59] Eisenburg, 43 Wn. App. at 766 (quoting 39 Am. Jur. 2d Guardian and Ward § 1 (1968)).
[60] Carlson, 162 Wash. at 28. The court in Carlson noted that "[t]his court long ago set its face against such indifference on the part of the guardian or shifting of duties to others." 162 Wn. at 28. See also In re Estate of Drinkwater, 22 Wn. App. 26, 30, 587 P.2d 606 (1978) ("guardians must conform to stringent standards of responsibility"), review denied, 92 Wn.2d 1001 (1979).
[61] In re Guardianship of Hill's Heirs, 8 Wn. 330, 331, 35 P.1071 (1894) (court expressing sympathy with guardian for "annoyance, inconvenience and difficulties which necessarily beset" guardian in performing guardianship duties).
[62] In re Rohne, 157 Wash. 62, 74, 288 P.269 (1930).
[63] RCW 11.92.010.
[64] RCW 11.88 et seq., RCW 11.92 et seq.
[65] In re Hallauer, Wn. App. 795, 797, 723 P.2d 1161 (1986).

guardianships is a proper subject of legislative action,[66] guardianships are equitable creations of the courts and the courts retain ultimate responsibility for protecting the incapacitated person.[67]

The guardian is an officer of the court[68] and is directly responsible to the court, which seeks to protect the incapacitated person's interest through the guardian.[69] In practical effect, however, this court control may unfortunately be "largely theoretical", as the guardian is in actuality "virtually a free agent."[70]

The superior court appointing a guardian or limited guardian has continuing jurisdiction over the guardianship proceedings until the proceedings are terminated, notwithstanding its removal of the guardian[71]. The court still has jurisdiction, and until the guardian is discharged by the court, the ward's property remains in the exclusive control of the guardian, subject to court supervision.[72] The court with jurisdiction over the guardianship proceedings enjoys all powers of a court of general

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[66] In re Fujimoto, 130 Wash. 188, 194, 226 P. 505 (1924).
[67] Hallauer, 44 Wn. App. at 797.
[68] In re Haegele, 150 Wash. 355, 358, 272 P. 978 (1928). The court is the "superior guardian of the ward, while the person appointed guardian is deemed to be an officer of the court." SeaFirst Nat'l Bank, 89 Wn.2d at 200.
[69] In re Gaddis, 12 Wn.2d 114, 123, 120 P.2d 849 (1942).
[70] Fujimoto, 130 Wash. at 192. The court in Fujimoto noted that, in light of the huge case load with which courts must contend, "in actual practice the court knows very little concerning the guardian's acts; it is usually not informed except by reports which appear when requests are made to dispose of the property by sale."
[71] State ex rel. Greenberger v. Superior Court, 134 Wash. 400, 402, 235 P. 957 (1925).
[72] 1931-32 Op. Att'y Gen. 34, 35.

jurisdiction and may determine all issues arising out of the guardianship administration.[73] In the exercise of these powers, the court is not confined to the powers and procedures specified in the guardianship statutes, but may exercise the broad powers conferred under RCW 11.96A.020.[74]

Guardian of Estate Duties. The attempts by the estate guardians to limit their responsibility for GAHC were futile as they maintained a responsibility to monitor GAHC and the Special Ad.[75] The distribution of responsibilities by the fiduciaries did not and should not change the integrity of the whole guardianship. Joe did not regain all of his rights with regard to his financial estate until 2001.[76] Therefore, the fiduciaries were responsible for protecting and managing all his affairs to the extent he did not retain rights. A guardian's statutory duty is not modified absent an order.[77] The self-serving orders allowing the Banks to avoid managing GAHC did not alleviate them of monitoring and reporting on its activity.[78]

The guardian of an estate is responsible for annual reporting on assets even though some of those assets are managed by another fiduciary

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[73] See e.g., In re Kelley, 193 Wash. 109, 114, 74 P.2d 904 (1938); In re Williamson, 75 Wash. 353, 356, 134 P. 1066 (1913).
[74] In re Adamec, 100 Wn.2d 166, 174, 667 P.2d 1085 (1983).
[75] United Pac. Ins. Co. v. Buchanan, 56 Wn. App. at 376-77.
[76] CP 166-167, 395-399.
[77] RCW 11.88.120
[78] RCW 11.92.040.

– both fiduciaries must report annually.[79] If not, the guardian and GAL must bring the failure to report to the court's attention as they are officers of the court.[80] When seeking orders of discharge and approval of final accountings, FD, BOA, KEY, USB and Drews failed to fulfill the procedural requirements relating to notice and hearings inherent in guardianship proceedings.

Accountings. The historical duty of a guardian…to protect and preserve the guardianship estate, … to account for it faithfully, to perform all of the duties required by law…is codified at RCW 11.92.040(4).

> A guardian must file annually, within 90 days of the anniversary of their appointment, a written, verified account containing identification of the property, any additional property received, all expenditures, adjustments…including gains or losses, all property held in the guardianship including a fair market value.[81]

> Substantial Change in Income or Assets. A guardian is required…to "report any substantial change in income or assets of the guardianship estate within 30 days of the occurrence of the change. A hearing shall be scheduled for court review" …accordance with RCW 11.88.040.[82]

Limiting a Guardian's Duty. Guardianship orders are paramount to the process of limiting an incapacitated person's rights. An incapacitated person's legal rights are affected by a guardianship and any

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[79] RCW 11.92.040(2). United Pac. Ins. Co., 56 Wn. App. at 376-377; Carlson, 162 Wash. at 28-29.
[80] SeaFirst Nat'l Bank, 89 Wn.2d at 200; CP 37.
[81] RCW 11.92.040(2).
[82] RCW 11.92.040(3).

change or modification of a guardian's status requires a show cause proceeding.[83] When appointing a limited guardian ..."the court shall impose, by order, only such specific limitations and restrictions on an incapacitated person...as the court finds necessary for such person's protection and assistance."[84] In this case, orders purporting to limit a guardian's duties were not properly brought before the court by any Bank.

> Final Accounting. Within ninety days after termination of a guardianship, the guardian of the estate must petition the court for an order settling its account with regard to any and all receipts, expenditures, investments made, and acts done to the date of termination. On the filing of the petition for order approving the final account, the court sets a date for hearing, after notice in accordance with RCW 11.88.040.[85]

In reviewing the guardian's final account, the court is to scrutinize the account carefully, review earlier ex parte orders of the court entered in the proceeding, and disallow expenditures that appear to have been improvidently approved and that are manifestly in derogation of the ward's rights and of such a nature as to constitute bad faith on the part of the guardian.[86] At a hearing on such a final accounting, the expenditures must be corroborated and established as necessary.[87] In short, it is insufficient for a guardian to simply claim ignorance of the bulk of the

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[83] RCW 11.88.030(4), 11.88.120 (1990).
[84] RCW 11.88.010(2).
[85] RCW 11.92.053.
[86] Rohne, 157 Wash. at 74-75; See also Grady, 24 Wn.2d at 287-288; In re Sroufe's Estates, 74 Wash. 639, 643, 134 P. 471 (1913).
[87] Rudonick, 76 Wn.2d at 124-125; RCW 11.92.053.

estate. Therefore, entry of an ex parte order is not acceptable as the court as super guardian is not afforded an opportunity to reconcile expenditures and review previous orders entered as required by the statute.[88]

Notice. As stated above, for an order to have the final and binding effect of discharging a guardian of their fiduciary duties, notice according to RCW 11.88.040 must be complied with. That statute requires notice ten days prior to hearing personally served upon the incapacitated person and the guardian ad litem.[89]

The notice requirements of 11.88.040 are applicable at the commencement of the guardianship as well as at the time of the final accounting.[90] Case law interpreting 11.88.040 at the commencement of the proceeding renders a guardianship void if service of notice is not made according to RCW 11.88.040.[91] By analogy, failure of proper notice of the final accounting should likewise render the orders terminating the guardianship void. Failure to follow the requirements of the statute renders the order fatally defective and void.[92]

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[88] RCW 11.92.053.
[89] RCW 11.88.040.
[90] State ex rel Patchett v. Superior Court, 60 Wn.2d 784, 787, 375 P.2d 747 (1962). Grady, 24 Wn.2d at 288-289.
[91] In re Teeters, 173 Wash. 138, 142, 21 P.2d 1032 (1933) (guardianship was void where ward was not served with notice); Bouchat, 11 Wn. App. 369, 371, 522 P.2d 1168 (1974) (defective service of notice on ward rendered guardianship void).
[92] Patchett, 60 Wn.2d at 787, Grady, 24 Wn.2d at 288-289.

The fiduciaries' reliance on Batey v. Batey[93] in support of the assertion that formal notice requirements are not necessary is misplaced. Batey is distinguishable from Joe's circumstances. Batey involved a competent spouse and community estate. The court presumed that Mr. Batey was competent at the time he received the guardian's final account prior to the final hearing.[94]

RCW 11.88.040 is jurisdictional in nature.[95] Parties cannot waive or stipulate to a waiver of subject matter jurisdiction.[96] In Sullivan, the court stated the long-standing rule of law relating to subject matter jurisdiction:

> Jurisdiction relates to the power of the court, not to the rights of the parties as between each other.[97] Jurisdiction cannot, therefore, be conferred by agreement or stipulation of parties. Any judgment entered without jurisdiction is void.[98] A party may waive personal jurisdiction, but not subject matter jurisdiction.[99]

Void Judgments. The Washington Supreme Court ruled that when a fiduciary failed to follow statutory procedure and there is an **utter disregard of the statutory procedure**, the court acts outside its

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[93] Batey v. Batey, 32 Wn.2d 791, 796-797, 215 P.2d 694 (1950).
[94] Id.
[95] Bouchat, 11 Wn. App at 369; See Matter of Guardianship of McGill, 33 Wn. App. 265, 654 P.2d 705 (1982); See Mayer v. Rice, 113 Wash. 144, 193 P. 723 (1920).
[96] Sullivan v. Purvis, 90 Wn. App. 456, 460, 996 P.2d 912 (1998).
[97] Wesley v. Schneckloth, 55 Wn.2d 90, 93, 346 P.2d 658 (1959).
[98] Id. at 93-94.
[99] In re Puget Sound Pilot's Ass'n, 63 Wn.2d 142, 148, 385 P.2d 711 (1963).

jurisdiction in failing to comply with statutory procedure.[100] Patchett examined the question of whether an order discharging a personal representative in a probate context was void where the personal representative utterly failed in following the statutory procedures for final settlement and discharge.

> The probate court acted outside its jurisdiction in failing to comply with the statutory procedure. The law is well settled that an order entered without jurisdiction if void. [101]

In Patchett, the estate administratrix failed to file a final report and petition for distribution, publish notice 25 days prior to the hearing, mail notice of the hearing to the heirs and devisees, as well as other matters. As a result of these failures to follow statutory procedure and utter disregard of statutory procedure, the final order discharging her was void.[102] The law is well settled that orders entered without jurisdiction are void.[103] There are no time restrictions when a void judgment may be vacated.[104] Where the defect in the order is apparent on its face, the court has no discretion but to vacate or set aside a void order.[105]

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[100] Patchett, 60 Wn.2d at 787.
[101] Patchett, 60 Wn.2d at 787 (citing Grady, 24 Wn.2d at 288-289); In re Hoschied's Estate, 78 Wash. 309, 139 Pac. 61 (1914); See France v. Freeze, 4 Wn.2d 120, 102 P.2d 687 (1940).
[102] Patchett, 60 Wn.2d at 787 (citing Grady 24 Wn.2d at 288).
[103] Grady, 24 Wn.2d at 288-289. See France v. Freeze, 4 Wn.2d 120, 102 P.2d. 687 (1940).
[104] Grady 24 Wn.2d at 288; In Re Marriage of Hardt, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985).
[105] Wilson v. Hinkle, 45 Wn. App. 162, 167-69, 724 P.2d 1069 (1986).

In Bouchat, the court determined that all actions of the court in the guardianship proceedings were void because the notice to the ward was defective at the outset.[106] As a result of the void orders, the court retains jurisdiction and has a duty as a super guardian to protect Joe and his assets under its broad statutory and equitable powers.[107]

Ex parte orders entered during the pendency of guardianship proceedings are not res judicata but may be modified when the interests of justice demand.[108] In Rudonick, the Supreme Court stated:

> If the legislature had intended to change the rule and allow final orders to be entered ex parte, it would have used more specific language.[109]

Further, the court stated in Philbrick v. Parr,[110] that for the order to have res judicata effect as to the settlement of the final account, it must be entered "after due notice given." The court retains jurisdiction and the duty to protect Joe and his assets under its broad statutory and equitable powers.[111] In Grady,[112] the court held:

> ...ex parte orders, current reports, and other proceedings passed upon by the court during the pendency of the trust, while prima facie correct, nevertheless remain within the control of the court,

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[106] Bouchat, 11 Wn. App. at 371.
[107] RCW 11.96A.020; Shelley v. Elfstrom, 13 Wn. App. 887, 889, 538 P.2d 149 (1975); SeaFirst Nat'l Bank, 89 Wn.2d at 200.
[108] Rudonick, 76 Wn.2d at 123; Grady, 24 Wn.2d at 288.
[109] Rudonick, 76 Wn.2d at 123.
[110] Philbrick v. Parr, 47 Wn.2d 505, 509, 288 P.2d 246 (1955).
[111] RCW 11.96A.020; Shelley, 13 Wn. App. at 889. SeaFirst Nat'l Bank, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977).
[112] Grady, 24 Wn.2d at 288.

> so that before final settlement and discharge of the guardian, they may be set aside, modified, or corrected, if the requirements of justice demand such action.

The fiduciaries failed to follow guardianship statutes and case law and therefore, their orders are void. The courts will not sit idly by and see guardians lose the estate of an incapacitated person through mistakes in management and neglect of their duties.[113]

Standard of Review. On a motion for summary judgment, the moving party must show the absence of an issue of material fact.[114] A material fact is one upon which the outcome of the case depends.[115]

1. Frost & Drews

As de facto guardians, FD were subject to the same fiduciary duties as the Banks. The case law and statutes prove that FD failed to fulfill their statutory obligations as Special Ad. Counsel for BOA, Mr. Kipling, even refers to FD as guardians.[116] FD failed to follow court orders and statutory procedure as Special Ad and/or de facto guardians. They failed to report or file an accounting that provided any financial data with regard to the substantial change in the value of GAHC or what occurred in the management of the company from 1986-1997.

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[113] In re Guardianship of Ivaarson, 60 Wn.2d 733, 737, 375 P.2d 509 (1962). See also Shelley, 13 Wn. App. at 889.
[114] Young v. Key Pharm., 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989).
[115] Atherton Condo. Ass'n v. Bloom Dev., 115 Wn.2d 506, 516, 799 P.2d 250 (1990).
[116] RP, November 7, 2005 Superior Court Proceedings, page 13.

Frost & Drews Ex Parte Order of Discharge is Void. The ex parte presentation of FD final order was not what the statute contemplated for the order to have final and binding effect. Assuming the ex parte presentation satisfied the requirement of a hearing, FD failed to give statutory notice.

FD' counsel attempt to assert that Ms. Holt's presence in court on her motion noted to remove the guardian of the person should somehow suffice in FD meeting their statutory notice requirements. CP 395-399. It does not. The fact that Joe's counsel did not specifically object at that hearing has no bearing on the invalidity of FD 1997 Order. An attorney cannot waive or stipulate away the substantial rights of his client.[117] The court had no opportunity to review the case and previous orders as contemplated by the statute.[118] Since statutory notice was not provided, the August 15, 1997 order is simply void. The court has no discretion but to set it aside.[119]

Further, to the extent FD sought to be discharged as fiduciaries by the 1997 Order—and now claim they were discharged—they would have had to comply with the additional notice requirements of RCW 11.88.120.

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[117] Graves v. P. J. Taggares Co., 94 Wn.2d 298, 303, 616 P.2d 1223 (1980).
[118] RCW 11.92.053; In re Deming, 192 Wash. 190, 203, 73 P.2d 764 (1937).
[119] Wilson, 45 Wn. App. at 167-169.

This statute requires a "show cause" process. This procedure was ignored by FD. Consequently, FD's 1997 Order is void on this basis as well.

Frost & Drews Failed to Report Quarterly. In 1991, FD were required by court order to report quarterly to the guardian for the estate and the GAL as to the current condition of GAHC. CP 37. It appears some documents were provided to USB as reflected in the 2005 newly discovered documents.[120] However, the GAL has no record of receiving financial statements.[121]

FD incorrectly assert that Joe cannot directly or collaterally attack the August 15, 1997 ex parte order. However, a void order is always subject to attack when, as here, the court lacks jurisdiction it enter it.[122]

Relief. Therefore, the court should set aside and find void the August 15, 1997 order as well as require FD to complete a full accounting of GAHC, as well as account for all fees charged to and paid by GAHC and Joe. The summary judgment should be vacated and the case remanded for further proceedings.

2. Bank of America

BOA was appointed Co-Personal Representative in Jana's probate

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[120] CP 1087, 1089-1090, 1074-1077. Appendix "1" pages 6-7 show a timeline of the documents provided to USB.
[121] CP 1822-1823, 2008-2009.
[122] Patchett, 60 Wn.2d at 784.

and guardian of Joe's estate in 1986.[123] CP 244-246. Joe's most valuable asset was 250 shares of GAHC, valued at $9.85 million. CP 9-10.

BOA continually attempts to be held harmless from managing GAHC; nonetheless BOA had a duty to monitor GAHC as an asset of the guardianship. In the GAL report on the final distribution in the probate, GAL Parr touches on the issue of BOA requesting to be held harmless regarding GAHC as follows:

> [BOA]...requested a court order holding it harmless from any business decisions made during the course of the estate...**even though,...management of the business was within its scope of duties**. CP 602. [emphasis added].

First Report. BOA filed their first report in the guardianship for the period December 8, 1986 through November 30, 1988. CP 278-288. BOA refers to itself as the "limited guardian" of the estate in contrast to the letters of guardianship confirming BOA as guardian without limitation or a full guardian.[124]

Second Report. The second report covers November 30, 1988 through November 30, 1989. BOA acknowledges receiving Jana's share of GAHC raising Joe's interest to $15.35 million, but tries to limit its liability for GAHC states receiving no financial statements.[125]

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[123] Jana's father, Urban Florin, was the other Co-Personal Representative.
[124] CP 2655-2656. All succeeding fiduciaries repeat they are limited guardians without a change in Joe's legal status. CP 113-115.
[125] CP 11-17, 293-295.

BOA repeatedly characterized their orders by as telling it to "butt out," and that it have no responsibility for GAHC.[126] The orders did not relieve BOA of its fiduciary duty that included monitoring GAHC and reporting to the court.[127]

Third Report. In the third report, BOA reduced the book value of Joe's 500 shares of GAHC from $19,700,000 to $1.00 without explanation as required by RCW 11.92.040(3). CP 24-31. The GAL report also failed to address this issue.[128]

Fourth Report. The Fourth and Final Report of BOA and Waiver of Notice were filed September 16, 1991, the same day the order approving the report was entered. CP 44-95, 320-321. This did not afford the court, as "super guardian," adequate time to assess the fourth and final report and all activities of BOA since 1986. It also undercuts the public nature of a guardianship action. This is particularly troubling where significant issues such as the previous adjustment in value of the stock to $1.00 and the proposed transfer of 40% and ultimately 60% of Joe's stock in GAHC were not addressed by the GAL, BOA, or the court.[129] Before

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[126] RP, November 7, 2005 Superior Court Proceedings, page 16.
[127] RCW 11.92.040(2); United Pac. Ins. Co., 56 Wn. App. at 376-377; Carlson, 162 Wash. at 28-29.
[128] CP 2685-2686, 300-302.
[129] CP 1214-1221, 24-31.

resigning as guardian, BOA required a release from the GAL, Joe, Drews, and the Special Ad without court approval or GAL review and report.[130]

Additionally, the fourth Report contradicts itself - BOA states receiving all of the assets of Jana's estate with the exception of stock on page 2, and then acknowledges the stock as an asset on page 7. CP 45, 50.

Failure to Account for GAHC. Joes' shares in GAHC were assets of the guardianship estate, as acknowledged by BOA in 2005. CP 1557. Moreover, the stock valued at $9,850,000 was identified in the inventory filed by BOA. CP 9-10. A guardian has a duty to protect and preserve the estate and account for the estate faithfully.[131] The guardian's duty to account has always been required independently of statute.[132]

BOA was appointed full guardian of Joe's estate and cannot limit the scope of its duty absent a court order and hearing pursuant to RCW 11.88.120. CP 244-246. A hearing was never held. The burden is on BOA to act in the best interests of Joe.[133] BOA is a commercial fiduciary and cannot shield itself from liability by craftily drafting language. A guardian's duty is simply set forth at RCW 11.92.040 and only limited by

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[130] CP 2902-2996.
[131] Seattle First Nat'l Bank, 89 Wn.2d at 200-01. State ex rel. Nat'l Bank of Commerce v. Frater, 18 Wn.2d 546, 550, 140 P.2d 272 (1943) (It is the guardian's duty to bring before the court orders or judgments which he believes will unlawfully diminish the estate in his custody); RCW 11.92.040(4).
[132] Carlson, 162 Wash. at 29.
[133] Guardianship of Hamlin, 102 Wn.2d 810, 815, 689 P.2d 1372 (1984).

specific references in the order appointing guardian, or later court order.[134]

Joe, Frost, guardian of person Drews, Davies and GAL Parr signed a waiver of notice of hearing and acknowledged receipt of a copy of the Fourth and Final Account of BOA. CP 320-321. Joe's waiver did not have any effect because he was legally incapacitated.[135] No party can waive subject matter jurisdiction.[136] Nor can any final order be valid without notice.[137] As guardian, BOA failed in many respects to fulfill its fiduciary duties. Additionally, 2005 newly discovered evidence points out that BOA failed to disclose the extent of its involvement and knowledge about GAHC, thereby raising additional issues of material fact. BOA had a duty to oversee and monitor GAHC as well as the Special Ad.[138]

Corporate Governance. BOA failed to disclose the extent of its involvement and knowledge about the corporate operation of GAHC.[139] BOA participated in a special shareholder meeting held on December 21, 1986.[140] Pursuant to BOA's actions as guardian, Davies and Drews were elected to the Board of Directors, and were automatically indemnified from all liability associated with their activity, without regard to

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[134] RCW 11.88.095.
[135] United Pac. Ins. Co. v. Buchanan, 52 Wn. App. 836, 840, 765 P.2d 23 (1988).
[136] Sullivan, 90 Wn. App. at 460.
[137] RCW 11.88.040; Philbrick, 47 Wn.2d at 509.
[138] RCW 11.88.120 (show cause motion); United Pac. Ins. Co., 56 Wn. App. at 376-377.
[139] CP 975-976, 1177, 1179.
[140] CP 975-976, 1179-1180.

negligence. CP 975-976. It appears BOA received financial statements, a schedule of selling, general, and administrative expenses of GAHC, for 1986 and 1987.[141] Those documents reflect $387,382 in management and other professional fees for 1986, and $273,996 for 1987. CP 1223. This information was not disclosed to the court or the GAL.[142]

In summary, BOA's involvement with and their knowledge of GAHC corporate operation was not disclosed to the court or GAL. BOA obtained an order in December 1989 relieving it of certain obligations, and obtained subsequent orders, without fully disclosing its involvement with and knowledge of GAHC to the court or GAL.

Difficulty Obtaining Financial Statements. BOA's qualification that it had not received financial statements for the second accounting period appears designed to exclude statements received during the accounting period covered in the first report, and the fact that BOA had monitored GAHC. BOA received financial statements for GAHC for 1986 and 1987. CP 1184. Documents reveal that BOA had financial information concerning GAHC and monitored the asset.[143]

It appears that as a result of subsequently not being able to obtain

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[141] CP 1184, 1186, 1188-1189, 1223

[142] CP 2036-2037. CP 975-976. Appendix "1" pages 1-3 sets forth the chronology of these documents.

[143] For specific reference see the "Bank of America" section of "Guardianship Law Applicable to the Parties." CP 1184, 1186, 1188-1189, 1198.

information BOA decided not to monitor GAHC, sought a release and exoneration of liability within carefully drafted reports and court orders.

Monitor vs. Manage, Rocking the Boat. In its second report, BOA asserted that it received no financial statements and had an order entered that BOA "is released from all liability in connection with the management of GAHC and is not accountable for its operations".[144] BOA uses this order to limit its fiduciary liability and interpreted this order as indicating that it is no longer required to monitor GAHC, obtain financial statements or value the corporate stock. This view is expressed in an interoffice BOA letter from Macy to Gjovaag. The correspondence notes:

> The situation has calmed down considerably and we do not plan to *'rock the boat'* as long as things continue to run smoothly. Under the circumstances, I think an annual court order releasing us from all liability for GAHC is the right way to approach the management of this asset. CP 1206.

The interpretation not to monitor this significant asset of the guardianship is repeated in BOA memoranda.[145] "Neither Trust Business Management or 'this office' is managing or valuing this asset. Please change the market value from $15,350,000 to $1.00". CP 1210.

Excessive Professional Fees. BOA was aware of excessive professional fees being expensed by GAHC. CP 1206. That letter notes

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[144] CP 11-17, 293-295.
[145] CP 1208, 1210.

that over the past two years $661,378.00 of professional fees were expensed by GAHC. CP 1206. The fees include interim management fees billed by Drews and Davies. CP 1206. Ohashi determines that the figures imply that Drews and Davies have billed over $500,000 for interim management fees over the two-year period. CP 1206. This also raises the question of to what extent these were attorney's fees and fees of the Special Ad, which should have been disclosed to and approved by the court.[146] However, BOA chose not to report this to the court or GAL.[147]

Removal of Check and Balance Protecting Joe's Interests. While it was convenient for BOA to interpret its orders to mean it no longer had to monitor operations of GAHC, obtain financial statements or value the corporate stock so as to avoid "rocking the boat" and to continue to serve as guardian, it did not serve the best interests of Joe's estate, and in doing so breached their fiduciary duty. The guardian's monitoring of GAHC and reporting on it to the court provided a check and balance on the asset that was being *managed* by the Special Ad. This was particularly important when the Special Ad were not regularly reporting to the court on their activities and the income they were receiving and BOA knew it.

Moreover, BOA's internal interpretation of its responsibilities

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[146] Montgomery's, 140 Wash. at 53.
[147] CP 1822-1823, 2008-2009.

regarding GAHC is contrary to the court's order filed March 7, 1991. CP 37. The court made clear that the guardian of the estate had responsibilities for monitoring GAHC and directed the Special Ad report to the guardian of the estate and GAL on a quarterly basis as to the current condition of the GAHC. CP 37.

There was a special meeting of the Board of Directors on May 4, 1990. CP 1218-1220. This reflects the possibility of transferring 60% of Joe's stock to a management team where the Special Ad had initially reported a 40% transfer. CP 605-613. The Petition to Transfer was filed by the GAL while BOA was guardian.[148] BOA failed to disclose the planned transfer of initially 40% and subsequently 60% of the stock of GAHC to a third party as required by RCW 11.92.040(3).[149] Instead, BOA left it to the successor guardian, KEY, who was appointed less than a month before the stock was transferred on November 13, 1991. CP 96-97. Ultimately, 60% of GAHC was transferred to third parties. CP 96-97.

These newly discovered documents point out a number of activities that occurred behind the scenes in the management of this guardianship that were not reported to the court. As a result, the activities of the Special Ad went without review and evaluation by the court even though known

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[148] CP 2694-2697.

[149] RCW 11.92.043(3) requires reporting substantial changes in income or assets within 30 days of occurrence of the change. Based on the proposal to change the majority ownership in GAHC, BOA should have brought it to the court's attention.

by BOA. With the appellate court now knowing what was not reported, at least what was available in the files of counsel for BOA, what else occurred? What else has not been reported or disclosed?

Void Orders. BOA asserts that the September 1991 ex parte order fully and finally discharges them as "limited" guardian over Joe's estate. However, there are material questions of genuine fact in dispute that render summary judgment improper: (1) BOA was not a limited guardian; (2) the final order was defective for failure to give proper notice; (3) BOA failed to report on GAHC; and (4) BOA failed to disclose pertinent material on excessive fees and corporate governance of GAHC in their possession.

BOA has the burden on summary judgment to establish that all statutory requirements including procedural, substantive notice, and reporting requirements have been satisfied for a final, binding order. BOA cannot do so. BOA relies upon RCW 11.92.050 and argues that the three interim orders prior to the September 17, 2001 "final" order should be final. RCW 11.92.050 expects a "hearing" on the accounting. The ex parte presentation on the final order is not what statutes or case law contemplate for a final, binding order.[150]

BOA must rely upon the finality of their orders to assert res

[150] RCW 11.92.053, RCW 11.88.040; Philbrick, 47 Wn.2d at 509.

judicata. Their orders were, at most, ex parte orders based on lack of notice. Ex parte orders entered during the pendency of guardianship proceedings are not res judicata but may be modified when the interests of justice demand.[151] In addition, to the extent BOA asserts that the September 16, 1991 interim order is a final order, RCW 11.92.053 applies requiring ten-day notice per RCW 11.88.040, which they did not provide.

RCW 11.92.040(3) also requires the guardian to "report any substantial change in income or assets of the guardianship estate within 30 days of the occurrence of the change. A hearing shall be scheduled for court review."[152] This statute has no meaning if BOA may simply report that substantial assets (GAHC) of the estate exists, but it claims no knowledge or responsibility whether there was any substantial change in the value of that asset. At a hearing on a final accounting, the expenditures must be corroborated and established as necessary.[153] Here again, it is insufficient for the guardian to simply claim ignorance of the bulk of the estate.

Relief. The summary judgment should be vacated because there are material issues of fact and the procedural irregularity of the entry of BOA's final order. Therefore, the court's resultant subject matter

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[151] Rudonick, 76 Wn.2d at 123; Grady, 24 Wn.2d at 289.
[152] RCW 11.88.010.
[153] Rudonick, 76 Wn.2d at 123; RCW 11.92.050.

jurisdiction remains disputed. Additionally, BOA's failure to disclose material facts (2005 newly discovered evidence) reveals additional breaches of fiduciary duty and failure to follow statutory procedure. As a result of those failures, BOA does not have a basis for claiming the statute of limitations has run because their final order is void. The court should remand this matter for a full accounting by BOA.

3. KEY Bank

KEY was appointed guardian of the estate following BOA in 1991. CP 329-331. During its tenure as guardian, KEY filed two accountings.[154] Initially, KEY asserted that the stock of GAHC was excluded from the estate over which it was successor guardian. CP 322-328. Then, KEY accepted the stock, yet failed to monitor and report on it properly.[155]

Unauthorized Loan. On August 16, 1993, KEY received court approval for signing a new loan guaranty in favor of Centennial Bank. CP 348-350. In 2005, it was learned that KEY had executed an earlier guaranty of $500,000 to Key Bank and failed to disclose it to the court.[156] CP 1293-1295. The borrower is GAHC and the guarantor is Joe's guardianship estate. There is no petition for, or order of, authorization in the court file. Within seventeen days of executing that guaranty, KEY was

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[154] CP 351-353, 2713-2715.
[155] RCW 11.92.040(3); CP 1283-1284, 1286-1287.
[156] The appellate court should know that in 2005 KEY only produced 50 pages of discovery.

in court seeking approval for the Centennial Bank $500,000 guaranty. CP 348-350. It is questionable whether the court would have approved that order knowing of the other $500,000 guaranty, resulting in $1,000,000 of financial exposure. In this role, KEY was acting in derogation of its responsibilities to Joe, and was self-dealing.[157]

Sirius Development. In January 1994, Joe was involved in incorporating a new business, Sirius Development ("SD"), and the consideration for Joe's 40% share was $85,600. CP 980-984. This was never reported to the court; nor do we know how it was paid for or where the money came from. Court approval was not requested for Joe to purchase an asset. Joe did not have the legal authority to purchase this asset or be involved in a corporation without court consent.[158] In February 1994, KEY discharged itself retroactively to November 1, 1993. This created a five-month gap between the effective dates of KEY's discharge and USB's appointment, where no guardian took responsibility. SD was established during this gap. KEY did not account or report on this period, but left a paper trail indicating there was no guardian in place for the five-month period until USB started acting in that role in 1994.[159]

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[157] Eisenberg, 43 Wn. App. at 767-768.
[158] RCW 11.92.040(5); United Pac. Ins. Co., 52 Wn. App. at 840.
[159] CP 351-352, 113-115.

In February 1994, KEY filed a second and final report, resignation and petition for discharge. CP 354-357. Their report was filed seven days following their ex parte discharge. CP 351-352. KEY secured its order of discharge with the representation in its final report that it would file a supplemental accounting. CP 355. This was never filed. CP 113-115. No receipt was filed. KEY did not transfer the stock. The paperwork trail indicates the stock is still with KEY. CP 1283-1284, 1286-1287.

In the end, KEY disregarded statutory procedure concerning notice, reporting, and accounting, and failed to disclose material facts. KEY accepted the stock of GAHC (CP 1283-1284, 1286-1287), yet never transferred it to the succeeding guardian; nor is there any record of where the stock might be, other than with KEY. KEY still had a duty to monitor GAHC and failed to do so. KEY failed to inform the court that the Special Ad failed to report on GAHC. CP 37-38. KEY failed to marshal and report on SD.

The Order Purportedly Discharging KEY is Void. KEY received retroactive discharge. KEY argued that it was entitled to summary judgment on the strength of an ex parte order dated February 18, 1994. There was no notice given and there was no hearing. Although guardian ad litem John Parr approved the order for entry, there was no guardian ad litem report filed in conjunction with KEY's final accounting. CP 352.

Thus, the rule of law enunciated in Rudonick,[160] that ex parte orders in this context are subject to review and modification at any time until the guardianship is finally closed, applies.

Relief. The summary judgment should be vacated because there are material facts about the procedural irregularity of the entry of KEY's final order and as a result the court's resultant subject matter jurisdiction remains disputed. The final order was not noted for a hearing and the GAL signed it without filing a report. The statute of limitations has not begun to run because their final order is void and conditions of discharge were not met. Additionally, KEY's failure to disclose material facts (2005 newly discovered evidence) which revealed additional breaches of fiduciary duty and failure to follow statutory procedure as well as self dealing. For these reasons, KEY does not have a basis for claiming the statute of limitations has run. The court should remand this matter for a full accounting by KEY.

4. U.S. Bank

USB was appointed successor limited guardian over all of Joe's assets, with the exception of the common stock of GAHC, by ex parte order on in 1994. CP 113-115. Joe had a 40% interest in SD, which was formed in January 1994. CP 980-984. Joe's interest was a guardianship

[160] Rudonick, 76 Wn.2d at 123-124.

asset over which USB was responsible. CP 113-115. USB was aware of Joe's interest. CP 758-761. USB failed to report on SD in its annual reports, and failed to marshal, monitor, and account for this asset.[161]

The Organizational Consent of Directors of Sirius Development Corporation, a copy of which was included in the 2005 discovery documents from USB, reveals that the consideration for Joe's 40% interest in SD is $85,600. CP 980-984.

The order appointing USB required USB to file a receipt for the transfer of the estate's assets from KEY. CP 113-115. This was never done. USB was also required to collect information on GAHC quarterly from the Special Ad. CP 37. They did not report on the Special Ad's failure to provide the information.

In June of 1994, USB petitioned to allow Joe to guarantee a $720,000 loan to SD. CP 758-761. In July of 1994, USB petitioned to have Joe guarantee another loan to GAHC.[162] USB acknowledges both SD and GAHC, but fails to report on them. CP 765-767.

USB received an order of discharge for its third, fourth, and final reports in April 1997.[163] However, the third report was never filed, and the fourth report was not filed until May 13, 2002. CP 407-463. Part of

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[161] CP 116-161, 2722-2798.
[162] CP 3058-3060.
[163] CP 387-390. The third report appears as an attachment to the Declaration of Mooi Lien Wong in support of USB's summary judgment motion in 2004. CP 678-680.

the conditions of discharge as guardian of the estate was filing receipts, which were not filed until March 2000. CP 144-147. USB indicated in its first and second accountings that it did not have financial statements from GAHC. Contrary to that assertion, USB did have financial statements of GAHC.[164]

In February of 1997 an order appointing Ralph Drews successor limited guardian of the estate required USB to produce a supplemental accounting from the date of the order to the date of receipt of funds, and have Guardian Drews file an approval of the accounting. CP 377-386. The order releases USB only after Guardian Drews approves USB's supplemental accounting. CP 377-386. This approval was never filed and the supplemental accounting was never filed.[165]

New Evidence. We now know, through evidence discovered in 2005, that USB knew much more about what was occurring in this estate than it disclosed to the court.[166] There is a customer contact report dated October 4, 1994 prepared by Wong (USB bank official) that discusses the promissory note from GAHC. CP 1120. In it, USB advises Drews that they need an accounting from KEY for the period from October 1, 1993 to the time they completed the transfer, and that USB would do the

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[164] CP 1074-1077. USB's Fourth Report does not mention financial statements.
[165] Appendix "1" pages 8-9 confirms the lack of an "approval" and supplemental accounting.
[166] Appendix "1" pages 6-7 confirms USB's knowledge regarding GAHC.

accounting from that time forward to September 30, 1994. CP 1120.

USB repeatedly tells the court in their accountings that they received no financial statements.[167] Contrary to its assertion in support of the statement that it is not accountable for GAHC's operations, USB had financial statements for GAHC prior to submitting its first and second reports. Various documents confirm this.

- A February 11, 1995 letter from Ralph Drews to Mooi Lien Wong states financial statements for 1992, 1993, and the 11 months ending November 30, 1994 are enclosed. CP 1087.

- A February 24, 1995 interoffice memo from Owens to Wong referring to review of financial statements (CP 1089-1090), letter to Davies from Wong, dated March 1, 1995, indicating the bank recently received and reviewed requested financial statements of GAHC. CP 1092.

On March 17, 1995, a quit claim deed transferring property out of SD to Doug Groves occurs. CP 1079. On February 23, 1996, combined financial statements for GAHC and SD are sent to USB for 1995 noting that SD transferred ownership of 4.25 acres of land valued at $38,250 to one of its stockholders. CP 1074-1075. There is an interoffice memo from Wong to Owens at USB talking about the deed of land to Doug Groves. CP 1081. The memo goes on to say that the stock is not a part of the assets to be held by USB (GAHC). CP 1081. In fact, this land transfer was in SD, not GAHC, and USB failed to realize this was a different

[167]CP 116-161, 407-463, 2722-2798.

corporation. USB apparently did not investigate the appropriateness and efficacy of the transfer of assets in the guardianship estate, and did not report on the transaction or otherwise bring it to the court's attention. On April 5, 1996, a letter from Ralph Drews to Wong advises her that Joe's equity in SD is $60,000 as of December 31, 1995. CP 1069. Again, Joe's interest was not reported to the court.

An interoffice memo from Owens to Wong dated July 5, 1996 discusses a promissory note concerning GAHC and also addresses the conflict of interest issue with Davies. CP 1117-1118. An August 1996 memo notes GAHC being on the *brink of bankruptcy*. CP 1071. USB had a duty to monitor and report on GAHC, and deliberately failed to do so.[168]

USB's attempt to limit its liability in orders should not succeed. For example, the order on USB's second report states USB "Received no financial statements for [GAHC]" and "should not be held accountable." CP 370. This compromise impacting Joe did not comply with RCW 11.92.060 and SPR 98.16W.

Relief. The summary judgment should be vacated because there are issues of material fact as well as procedural irregularity of the entry of USB's final order. The order is void for failure to follow statutory procedure and therefore, the court's resultant subject matter jurisdiction

[168] CP 37; RCW 11.92.040.

remains disputed. Additionally, USB failed to disclose material facts indicating breaches of fiduciary duty and negligence disclosed in 2005. USB does not have a basis for claiming the statute of limitations has run because their final order is void based upon improper notice, breaches of fiduciary duty and disregard of statutory procedure. The court should remand for a full accounting by USB.

5. Guardian Drews

Ralph Drews was appointed guardian of the person on December 26, 1989 and appointed fourth successor guardian of the estate on March 3, 1997.[169] The order appointing Drews was modified. CP 395-399. Drews was responsible for filing reports tri-annually. The first report was due January 2000. CP 397. According to the order discharging USB, Drews was required to make sure USB provided an additional accounting, as well as receipts. CP 377-386. The receipts were not filed until three years later and the accounting was not completed. In the order terminating the guardianship in 2001, Drews was to present his final report and comply with the terms of the order, which he never did. CP 166-167. The final report was filed on May 3, 2002, but an order was not entered approving it. CP 1076-1096. Further, Joe contends that Drews has not turned over all of his property. CP 655. Guardian Drews failed to petition

[169] CP 293-295, 377-386.

the court per RCW 11.92.053 for an order settling his account.

January 26, 2001 Order Does Not Discharge Drews. Drews misrepresents the content of the January 26, 2001 order. Drews' position is the Thurston County Superior Court discharged him as limited guardian of the estate. CP 166-167. This is simply false. This order was presented by Joe's attorney Holt and was stipulated to by Drews' counsel, Lyman. The order :

- Terminates the limited guardianship of the estate and returns to Joe all of his rights.
- Requires Drews to account for his activities as limited guardian from the time of his appointment in March 1997 to the time of termination in accordance with statute.[170]
- Requires that Joe and Drews, as limited guardian, agree to a reasonable time for the completion and filing of the limited guardian's final report.
- Requires that the petition for court's approval of the limited guardian's report be filed at a reasonable time after the final report is completed by agreement of the parties.
- Requires the limited guardian to transfer control of all property belonging to Joe to him within 10 days. CP 166-167.

The order clearly does not do what guardian Drews repeatedly asserts i.e., it did not discharge Drews as limited guardian. In fact, it specifically required Drews to comply with his remaining statutory duties

[170] (Emphasis added.)

as limited guardian and to cooperate with Joe while the transfer of financial control took place and the limited guardian's required duties were being completed. CP 166-167. Since the guardianship has not been finalized, Joe retains the right to seek amendment of any interlocutory order.[171] Accordingly, the guardianship action remains open.

Relief. The summary judgment should be vacated because there are material issues of fact concerning whether Drews was discharged as limited guardian of the estate. Drews' final accounting has not been approved by the court. Because Drews has not been discharged as limited guardian of the estate, the statute of limitations has not begun to run. The court should remand this matter for a determination whether Drews has fully accounted and whether he returned all of Joe's property.

Conclusion as to the Fiduciaries. There was an utter disregard for statutory procedure in this guardianship by all fiduciaries involved. The manner in which this guardianship was managed and presented to the court harms the integrity of the court as super guardian and flouts the guardianship statutes and case law. There is a pattern of ignoring statutes and the spirit of guardianship law. The guardians failed to protect Joe and failed to see that GAHC and SD were reported on. This failure led to the Special Ad hiding the majority of their actions from the court and Joe.

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[171] Grady, 24 Wn.2d at 288; Rudonick, 76 Wn.2d at 124.

Guardians cannot rely on orders discharging them when they fail to disclose material information and fulfill their responsibilities. Since the fiduciaries do not have valid orders of discharge, the statute of limitations has never commenced. This court should rule all final orders are void and declare there are material issues of fact, and the court should deny the requests for summary judgment by all the fiduciaries, reverse the ruling of the trial court, and remand the matter for full accountings and trial.

B. Guardian ad Litem Parr

The fiduciaries assert that the GAL's signature makes their orders approving reports and discharging them final orders, not subject to attack by Joe's complaint. The fiduciaries seek to use the GAL as their shield of protection as well as a sword to cut off Joe's legal rights to pursue his cause of action. Approval of orders by the GAL should not result in final orders, or bind Joe, where the GAL failed to properly investigate and report, follow court orders and guardianship statutes, and where he is not fully informed by the fiduciaries.

Role of Guardian ad Litem. The GAL's role is to investigate and supply information and recommendations to the court.[172] The objective is to voice the best interests of the individual who is the subject of the

[172] Guardianship of Stamm, 121 Wn. App. 830, 837, 91 P.3d 126 (2004).

proceedings.[173] RCW 11.88.090 specifically sets forth a GAL's duty in the context of a guardianship proceeding. After incapacity is determined, a GAL's role is still to protect the interests of an incapacitated person.[174] There are limitations in the role of a GAL. This includes the prohibition from waiving any substantial rights of the incapacitated person.[175] This prohibition applies even when the appointment of the GAL is made after the determination of incapacity.[176] A guardian ad litem is an arm of the court whose function is to protect the ward, and the court does not permit its arm to strangle him.[177]

1. GAL Reports and Approval of Related Orders

Bank of America. The GAL was appointed in the guardianship to investigate the appointment of a guardian for Joe in 1986 and in the probate in 1988 to investigate the final report of personal representatives and actions of the Special Ad. CP 600-604. In the probate report, the GAL noted that BOA requested to be held harmless from any business decisions made during the course of their tenure. CP 601-602.

The GAL did not report on the nature or amount of claims from

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[173] Id. (citing RCW 11.88.090).
[174] Welfare of Colyer, 99 Wn.2d 114, 133, 660 P.2d 738 (1983).
[175] Guardianship of K.M., 62 Wn. App. 811, 816, 816 P.2d 71 (1991).
[176] Id.
[177] Ivaarson, 60 Wn.2d at 737 (quoting Haden v. Eaves, 55 NM 40, 47, 226 P.2d 457 (1950). The Ivaarson court went on to say that if some phase of a guardianship proceeding is before an appellate court, it will act *sua sponte* to protect the apparent interests of the ward or wards and will not dismiss a meritorious appeal by a next-friend in such a proceeding merely because a guardian ad litem has been appointed.

which BOA would be released, the consideration provided, and whether the release is in the best interests of Joe. CP 600-604. The release is a compromise of claims, and the GAL did not report on the failure to comply with SPR 98.16W, which relates to the settlement of claims of incapacitated persons.[178]

In the same report, the GAL states the Special Ad's (FD) report was a clear and concise narrative of the events leading to their appointment and the operation of the business. CP 600-604. He does not comment that the Special Ad's report does not include a financial accounting, however. The GAL notes a report regarding the post-estate operation of the business is being deferred to a GAL report being prepared for a December 27, 1988 guardianship hearing. CP 600-604. This was never followed up on.

The GAL filed a report in the guardianship dated December 22, 1988, concerning BOA's first report. CP 284-288. Despite the guardianship inventory identifying 250 shares of GAHC valued at $9,850,000, the GAL did not mention it. CP 9-10.

In December 1989, the GAL filed a report regarding the second report of BOA which is similar to his 1988 report. CP 290-292. In the second report, BOA states it has no responsibility for the management of

[178] McGill, 33 Wn. App. 265, 267-270, 654 P.2d 705 (1982); See also Guardianship of K.M., 62 Wn. App. 811, 816 P.2d 71 (1991).

the company, has received no financial statements for GAHC during the accounting period, and should not be held accountable for its operations. CP 11-17. This is distinct from BOA's first report. The GAL, however, fails to report on this distinction. Significantly, this assertion is contrary to the GAL's initial report in the probate, where he noted that as **Co-Personal Representative for the estate, management of GAHC was within the scope of BOA's duties**. CP 602. If BOA was responsible as personal representative, how could they not be a guardian? He fails to report that the guardian has received no Special Ad reports on GAHC.

The GAL's third report of BOA was very similar to the 1989 second report in format. CP 300-302. On the third page, it repeats that Drews should be appointed as limited guardian for the person of Joe (as was stated in the second report).[179] The report format is an indication that the GAL simply used a previous report as the basis for a current report. In its third report, without explanation, BOA adjusted the value of the GAHC stock from approximately $19,700,000 to $1.00. CP 24-31. The GAL did not report on the reduction of value of the stock. Did the reduction mean that GAHC had no value?

The GAL did not report on BOA's fourth and final account. He did sign the order of approval, waiver of notice, release (gave away a

[179] CP 290-292, 300-302.

substantial right of Joe's), and agreed to ex parte entry. CP 309-19.

Key Trust. The GAL reported on the first report of KEY and the limited guardian of the person. CP 342-3. The report provides little information and significantly, omits critical information. KEY accepted the GAHC stock into the estate, but failed to report on it in its first report. CP 1107-11. The GAL failed to address this lack of disclosure. The March 7, 1991 order to combine promissory notes required the Special Ad to report to the guardian of the estate and the GAL on a quarterly basis regarding the condition of GAHC. CP 37. KEY and the GAL failed to report on this issue, particularly the failure of the Special Ad to provide reports. At the GAL's deposition in 2006 he acknowledged he had no financial statements in his file. CP 1822, 2005. The GAL did not report on the second and final report; however, he did sign it. CP 115.

U.S. Bank. The GAL evaluated the first report of USB. KEY, as preceding guardian, had accepted the stock of GAHC into the guardianship estate, but had not transferred to it to USB.[180] The GAL failed to bring to the court's attention that there was no receipt indicating where the stock was.

USB was appointed guardian on February 18, 1994. CP 113-115. The resignation of KEY, the preceding guardian, was made retroactive to

[180] CP 116-161, 1107-1111.

November 1, 1993. CP 351-352. This resulted in a period during which no guardian accepted responsibility. The GAL failed to address this issue in his evaluation of USB's first report or report this major discrepancy to the court.

The GAL reported on the second report of USB and the report of the guardian of the person in December 1995. CP 368-369. This report is similarly conclusory as prior reports, and is approximately two pages . CP 368-369. It does not provide any information as to what was done in his investigation other than referring to the guardian's report. The report notes that the GAL had reviewed and reported to the court concerning each financial report since the inception of the guardianship. CP 368-369. This is incorrect.

On June 21, 1994, USB petitioned for modification of a prior order of the court. CP 758-761. In that document, USB identified Joe's 40% interest in SD. CP 758-761. USB's second report fails to account for this asset. The GAL did not report on this discrepancy. CP 368-369.

The GAL's conclusory reports indicate his investigations involved little more than simply reading the reports of the fiduciaries, and doing nothing more than rubber stamping their activities.

2. Exoneration Provisions

At least nine orders approved by the GAL contained exoneration

language. The only guardian that did not seek exoneration language was KEY. Some include:

Order on second report of BOA:

> Although the stock of [GAHC] is an asset of guardianship, BOA released from all liability...connection with management of [GAHC] and not accountable for operations". CP 293-295.

and fourth and final order of BOA:

> BOA "not...involved in...management of [GAHC]...stock of [GAHC] is...asset of...guardianship." BOA "received no financial statements for [GAHC] during the accounting period and is not accountable..." CP 315-316.

the orders approving its first and second reports of USB:

> ...Guardian of the estate be and...not in any way held accountable for the management of [GAHC]... CP 363, 371.
>
> "Received no financial statements for [GAHC]" and "should not be held accountable ." CP 370.

In 1997 orders approving the Special Ad's reports:

> ...James M. Frost and Ralph H. Drews are hereby discharged from the office of Special Administrator and from any and all liability in connection with their duties as Special Administrators. CP 394.

The fiduciaries protected themselves rather than protecting Joe from harm. They attempted to limit their fiduciary liability by way of language exonerating themselves in violation of case law. The GAL approved this language in derogation of his duty.

Frost & Drews. The GAL signed the Special Ad's 1997 order. CP

393-394. He did so even though since 1991, the Special Ad were to report to the guardian and GAL on a quarterly basis (CP 37), and the 1997 report was the first known report filed in the guardianship. CP 162-5. The Banks repeatedly said they received no financial statements.[181] The GAL did not report the lack of financial statements, and he testified at his 2006 deposition that he had no financial statements.[182] He failed to investigate orders that he signed. [183] The lack of investigation is evident, as many of the motions were entered ex parte with limited or no notice. [184] There was no report in the file before each of the orders was signed.[185] The GAL literally could not have investigated each of the accountings that he signed due to the timing of the entry of the report and order.[186]

Motions and Other Action. The GAL acted in various roles. He prepared a will as an attorney for Joe (CP 101), served as his GAL, and when serving as a GAL, Joe understood him to be his attorney.[187] The GAL at times acted as advocate for the guardians,[188] for Joe,[189] and for others.[190] In August 1991, the GAL petitioned for the approval of the

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[181] CP 11-7, 24-31, 44-95, 354-357, 362-365, 407-463, 2713-2715; 2722-2798.
[182] CP 2005, 2031, 2033, 2045, 2047.
[183] CP 18-23, 44-95, 351-353, 348-350, 387-390, 393-394, 762-764.
[184] CP 18-23, 44-95, 351-353, 348-350, 387-390, 393-394, 762-764.
[185] CP 309-319, 351-352, 393-394, 387-390.
[186] CP 309-319, 351-352, 393-394, 387-390.
[187] CP 2682-2684.
[188] CP 2694-2697, 2662-2667, 2675-2681, 2692-2693.
[189] CP 2716-2718, 2692-2693, 2675-2681.
[190]CP 2694-2697, 2662-2667, 2675-2681, 2675-2681.

issuance of corporate stock.[191] The GAL acted outside his role, his responsibilities, and his duty.[192] In the petition, the GAL acted as an advocate and sought authorization for transfer of 60% of Joe's interest in GAHC. The GAL failed to report on alternatives. This transfer compromised Joes' majority interest in his company. He did not report on the specifics of the informal agreement he refers to as the basis for the transaction. CP 2694-2697.

There was no report from the Special Ad. The GAL failed to mention the Special Ad had originally reported 40% was to be transferred. CP 18-23. BOA should have petitioned and the GAL should have reported. This petition indicates that the GAL was advocating for the people who were to receive a controlling interest in Joe's business. The GAL did not properly investigate and voice Joe's best interests. Instead, the GAL improperly acted as an advocate, which is the role of an attorney rather than a GAL.[193]

The GAL acted as Joe's advocate when petitioning to transfer funds into a discretionary spending account. CP 2716-2718. The GAL petitioned for a determination whether Joe should make a $55,000 capital contribution to GAHC. CP 2662-2667. He petitioned on behalf of Joe for

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[191] CP 2694-2697.
[192] Stamm, 121 Wn. App. at 837; Colyer, 99 Wn.2d at 133; Guardianship of K.M., 62 Wn. App. at 816.
[193] RCW 11.88.045(1)(b).

a determination whether it was in Joe's best interest to sign a personal guarantee for GAHC's $550,000 line of credit, and if a $55,000 promissory note owed to Joe should be converted to equity or the payment extended.[194] Joe, in a supporting declaration, expressed his understanding that the GAL was acting as his attorney. CP 2682-2684. The GAL petitioned on behalf of Joe for a change in guardians from BOA to KEY. CP 2692-2693. The GAL recommended the change, but did not investigate and report. CP 2692-2693. The GAL was wearing two hats, GAL and attorney for Joe, which is a conflict of his fiduciary duty to Joe.[195] The guardians should have petitioned for relief, not the GAL. This behavior on the part of Parr confused Joe, who thought he was represented by an attorney when he was not. CP 2682-2684. The GAL allowed the guardians and Special Ad's to take actions without true reporting and investigation to the court. The appointment of a permanent GAL should be frowned upon by the courts.

On November 7, 1991, Arthur Davies noted in open court that he represented Joe prior to Joe suffering his injuries.[196] Davies represented the guardians, BOA, KEY, USB, and Drews, as well as FD.[197] The GAL

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[194] CP 2675-2681.
[195] GALR 2(b) and (e); RCW 11.88.045(b).
[196] CP 106, 2698-2712.
[197] Appendix 2.

attended the 1991 hearing and failed to address this conflict of interest and consequently failed to protect Joe's best interests.[198]

Fiduciaries Failed To Disclose Information To GAL. The fiduciaries failed to disclose critical information to the GAL, which impacted his ability to protect Joe's interests as discussed in detail in the "Guardianship Law Applicable to the Parties" section of the brief.[199]

BOA repeatedly represented that it was respecting Joe's request that it not be involved in the management of GAHC, had no responsibility for the management of the GAHC, received no financial statements during the applicable accounting period and therefore should not be accountable for GAHC.[200] However, BOA did not disclose to the court or GAL its involvement and knowledge with the corporate operation of GAHC as shown by minutes of GAHC meetings, letters and internal memos. CP 975-976. BOA made recommendations concerning corporate organization including restructuring the Board and electing officers, and requested specific information to keep apprised of the status of GAHC.[201] BOA was aware of approximately $500,000 in management fees paid to Davies and Drews over a two-year period, but not disclosed to the court or GAL.[202]

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[198] CP 99, 101-106.
[199] The undisclosed information is referenced in Appendix "1" pages 1-7.
[200] CP 11-17, 24-31, 46-50.
[201] CP 1177, 1179-80.
[202] CP 1191-1196, 1822-1823, 2008-2009.

KEY executed a commercial guaranty in the amount of $500,000 on behalf of Joe's estate, and in favor of KEY Bank without court or GAL approval. CP 1293-1295. SD was formed prior to KEY'S discharge, yet KEY did not report on SD or the consideration presumably expended from Joe's estate for SD.[203] Instead, KEY obtained an order of discharge that related back to November 1, 1993, resulting in a period where no guardian took responsibility for Joe's estate. CP 351-352.

USB failed to marshal SD and in 1995, SD transferred ownership of 4.25 acres of land valued at $38,250.[204] USB acknowledged the issue internally, but failed to report to the court or GAL. CP 1081. USB obtained an order of appointment that limited its liability with regard to GAHC based in part upon the representation that it had no financial statements for GAHC or the stock. CP 113-115. This was repeated in USB's first and second reports.[205] Various documents confirm that USB had financial statements for GAHC, contrary to USB's representations.[206] USB had concerns about GAHC being on the brink of bankruptcy in 1996, but did not bring this to attention of the court or GAL. CP 1071.

The fiduciaries' failure to disclose critical information to the GAL undercut his ability to protect Joe's interests. As a result, the fiduciaries

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[203] CP 354-357, 980-984.
[204] CP 113-115, 1074-1077
[205] CP 116-161, 2722-2798.
[206] CP 1087,1089-1090,1074-1047.

should not be permitted to use the GAL's incomplete reporting, lack of knowledge, and approval of orders to shield them from liability.

Guardian ad Litem Rules and Law. The Superior Court Guardian Ad Litem Rules (GALR) were adopted effective November 2001, and are common sense rules, which establish what is considered a minimum set of standards for GALs.[207] These standards include that a GAL: represent best interests, maintain independence, avoid conflicts of interests, limit duties to those ordered by the court, and maintain documentation.[208] As indicated above, GAL Parr's actions in multiple circumstances would not meet these minimum standards. A GAL's role is to promote the best interest of an incapacitated person.[209] This is distinct from the role of counsel, which is to act as an advocate, and not substitute counsel's judgment regarding what might be in the client's best interests.[210]

The Guardian ad Litem Failed to Protect Joe's Interests. This unorthodox guardianship that was created by the fiduciaries and their attorney failed to protect Joe. They eliminated the checks and balances within the statutory system, and each failed to report on the other. The GAL was included in this failure by acting in different roles at different

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[207] GALR 1.
[208] GALR 2.
[209] RCW 11.88.045(2); Colyer, 99 Wn.2d at 133.
[210] RCW 11.88.045(2).

times—sometimes as Joe's attorney,[211] sometimes as Joe's Guardian ad Litem[212] and sometimes as the protector of the fiduciaries.[213] Joe's GAL failed to fulfill his duties in numerous circumstances, was kept in the dark about GAHC by the fiduciaries, exceeded his authority by signing a release on behalf of Joe, approving exonerating language for the fiduciaries, acting as Joe's attorney, and agreeing to waivers of notices.[214]

The erosion of the checks and balances within the guardianship creates a lack of scrutiny. The lack of scrutiny occurred because the same attorney represented literally all the parties at one time or another. The same GAL continued in that role from 1986-1997. As a result, there were gaps in Joe's statutory protection. There are failures to follow the statutes for notice of hearings for evaluation of accountings.[215] The GAL reports were boilerplate.[216] Finally, the Banks failed to monitor what the Special Ad did, washed their hands of their responsibility in violation of their fiduciary duties, and the GAL helped them by not reporting to the court.[217]

The Banks and Special Ad continually try to use the GAL as a

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[211]CP 2716-2718, 2675-2681, 2692-2693.
[212] CP 600-604, 284-288.
[213] CP 309-319, 351-352, 387-390, 393-394, 2694-2697, 2662-2667, 2675-2681, 2902-2996.
[214] CP 294-295, 363-365, 371-372, 101, 320-332, 351-353, 2902-2996, 2687-2689, 2694-2697, 2716-2718, 2662-2667, 2675-2681, 2692-2693; See Guardianship of K.M., 62 Wn. App. 811, 816 P.2d 71 (1991).
[215] CP 162-165, 387-390, 309-319, 351-352.
[216] CP 290-292, 300-307, 342-343, 360-361, 368-369.
[217] CP 24-31, 44-95, 354-357, 116-161, 2713-2715, 2722-2798.

sword and a shield, trying to hide behind the exonerating court orders they prepared and the signature of the GAL. They cannot be allowed to use the GAL in that manner, when the GAL does not have the information to form an opinion,[218] does not investigate,[219] is not told the facts,[220] does not properly report on GAHC, and relies on oral statements of the Special Ad and the Banks.[221]

The Banks and Special Ad used the GAL to protect themselves without following all the statutory, reporting, and notice requirements. The GAL obliged the Banks by signing the orders presented. [222] The role of the GAL as used in this case was wrong. The GAL is an arm of the court whose function is to protect Joe and the not strangle him.[223] Joe is asking that the GAL not be used to stop him from pursuing his legal rights.

C. BOA's Release

BOA received a release from Joe in connection with the 1991

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[218] CP 1223, 1182, 1184, 1186, 1188-1189, 1191-1196, 1200, 1202, 1206, 1208, 1297-1298, 1293-1295, 977, 980-984, 1087, 1089-1090, 1092, 1079, 1074-1077, 1117-1118.
[219] CP 309-319, 351-352, 387-390.
[220] CP 1223, 1182, 1184, 1186, 1188-1189, 1191-1196, 1200, 1202, 1206, 1208, 1297-1298, 1293-1295, 977, 980-984, 1087, 1089-1090, 1092, 1079, 1074-1077, 1117-1118.
[221] CP 600-604, 1936-1938.
[222] CP 18-23, 44-95, 351-353, 348-350, 387-390, 393-394, 762-764.
[223] Ivaarson, 60 Wn.2d at 737 (quoting Haden v. Eaves, 55 NM 40, 47, 226 P.2d 457 (1950)). The Ivaarson court went on to say that if some phase of a guardianship proceeding is before an appellate court, it will act *sua sponte* to protect the apparent interests of the ward or wards and will not dismiss a meritorious appeal by a next-friend in such a proceeding merely because a guardian ad litem has been appointed.

fourth and final report.[224] A release of fiduciary liability in the context of a guardianship is extremely unusual. It appears from the record that BOA decided they no longer wanted to be responsible for managing GAHC and involved on the Board of Directors.[225] Instead of revealing to the court why they wanted to limit their responsibility, they chose to pursue a release signed by Joe before they stepped aside as guardian. CP 1206.

The release is particularly troubling given the fact that there was no GAL report addressing the fourth and final report or the release or court order. Likewise, several issues of fact remain as to BOA fulfilling its fiduciary duty as a guardian of Joe's estate.[226] The same attorney, Davies, was representing the Special Ad and guardian BOA. Banking officials at BOA would not resign without receiving a release from Joe and therefore refused to step down as guardian of the estate. The release was not filed in the court file until 2004 and then it was filed as an exhibit to a declaration of BOA's counsel. CP 1206.

BOA attempts to use this release to protect themselves from any action by Joe. At the time Joe signed this release he was incapacitated.

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[224] CP 2902-2996.
[225] CP 1191-1196, 1198, 1200, 1202, 1204.
[226] Failure to account for decrease in value of GAHC stock. CP 24-31. Proposed transfer of 40% or 60% of Joe's interest in GAHC and the excessive professional fees paid by GAHC without court approval. CP 1196-1197. Court not apprised of Special Ad failure to report quarterly following court order. CP 24-31.

There was no court order authorizing him to sign the release nor was there a court order allowing the GAL, the guardians, or the Special Ad to sign the release. CP 309-319. The court did not approve the release. CP 309-319. In essence, there were no claims to compromise and a guardian cannot sue its ward during the guardianship.[227] How can there have been a claim? If there was a claim, then it should have been brought to the attention of the court.[228] BOA breached their fiduciary duty by failing to disclose in detail the reason for the release and requesting court approval.

The GAL executed the release in favor of BOA.[229] The GAL did not report on the specifics of the release, such as the consideration provided, the nature of the proposed claim released, and whether the release was in the best interest of Joe. The GAL failed to comply with RCW 11.92.060, relating to the compromise of claims in connection with a guardianship, and did not comply with SPR 98.16W, which relates to the settlement of claims of incapacitated persons.

As required by the Special Proceedings Rule ("SPR"), where there is settlement of a claim for an incapacitated person under RCW 11.88, the court shall determine the adequacy of the proposed settlement on behalf of

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[227] Rupe v. Robinson, 139 Wash. 592, 594, 247 P. 954 (1926).
[228] RCW 11.92.060.
[229] CP 2902-2966.

the person and either accept or reject it.[230] The SPR outlines the petition that needs to be filed, the necessity of appointment of a settlement GAL and what the report of the settlement GAL should contain.[231]

In a guardianship, in order to commence a legal action against an individual, court approval must be secured before initiating the legal action.[232] If, in fact, there is no legal action commenced and a suit arises without the filing of a lawsuit, the court still needs to be notified.[233] The guardian has a duty to defend the interests of the ward.[234] Further, the guardian may not maintain an action against the ward during the pendency of a guardianship proceeding, nor until after the guardian's discharge.[235]

A different GAL would have needed to be appointed to review the situation and determine whether or not execution of a release was appropriate, and secondarily, whether adequate consideration flowed to Joe for signing the release. It appears that there was no consideration for the release, other than BOA agreeing to step aside. In addition, an incapacitated person lacks capacity to enter into contracts.[236]

Further, the McGill case requires notice via RCW 11.88.040 and a

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[230] SPR 98.16W.
[231] SPR 98.16W(b), (c), and (e); McGill, 33 Wn. App. at 270.
[232] RCW 11.92.060(1).
[233] Id.
[234] Mattson v. Mattson, 29 Wash. 417, 421, 69 P. 1087 (1902).
[235] Rupe, 139 Wash. at 594.
[236] United Pac. Ins. Co., 52 Wn. App. at 840.

report pursuant to SPR 98.16W or else the settlement is void.[237] By signing the release on behalf of Joe, the GAL was waiving a substantial right of Joe's, which is prohibited by law.[238] The requirements of RCW 11.92.060 and SPR 98.16W must be satisfied. These requirements were not met and so the release is void.

D. Statute of Limitations

The Banks and FD are using the statute of limitations as a shield to protect themselves from their failure to disclose and account properly. The court has to balance the policy of statute of limitations with the rights of a vulnerable adult. All orders that the court was asked to set aside were entered during the time Joe was legally incapacitated. At the very least, the statute of limitations was tolled until Joe regained capacity in 2001.

The Court of Appeals Division I considered the tolling of the statue of limitations with regard to incapacitated persons in Rivas v. Eastside Radiology Assoc.[239] In Rivas, the appellant asserted her cause of action was extended because she was in a coma for four days. Although the court decided that it would not extend the statute of limitations based on those facts, the court discussed RCW 4.16.190, which addresses tolling the statute of limitations in cases of personal disability. The court failed to

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[237] McGill, 33 Wn. App. at 269.
[238] Guardianship of K.M., 62 Wn. App. at 816.
[239] See Rivas v. Eastside Radiology Assoc., 134 Wn. App. 921, 143 P.3d 303,335 (2006). Rivas involved a medical malpractice suit.

extend the statute of limitations in Rivas because a guardianship could not have been established in such a short a period of time – 4 days.

RCW 4.16.190 provides that an incapacitated person's statute of limitations be tolled if, in fact, they were found incompetent or disabled pursuant to RCW 11.88.[240] Young v. Key Pharm., Inc.[241] discussed the effect of a disability on the ability to bring suit. The Young court noted that the tolling statute did not mention the effect of the guardian's appointment, and interpreted that to mean "the statute was intended to operate regardless of the guardian's presence."[242]

Applying these lines of thought, at the earliest the statute of limitations did not begin to run against Joe on any legal action related to the guardianship until he regained his capacity in 2001. After regaining capacity, Joe attempted repeatedly, through his attorney, to gather information regarding his business. When he was unsuccessful, this lawsuit was filed in order to force an accounting and determine what happened to his business. [243]

The court retains jurisdiction to protect the ward including his assets per broad statutory and full powers.[244] Void orders are subject to

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[240] RCW 4.16.190.
[241] Young, 112 Wn.2d at 221.
[242] Id. at 221.
[243] CP 168-175, 213-221, 262, 1028-1031, 1351-1365, 655.
[244] RCW 11.96A.020; Grady, 24 Wn.2d at 288-289.

attack.[245] Final discharge of a fiduciary requires compliance with RCW 11.88.120. Similarly, petition for final approval of an accounting under RCW 11.92.053 requires ten-day notice per RCW 11.88.040. Failure to comply with notice requirements renders orders defective and void.[246]

Here, the fiduciaries failed to follow court orders and statutes:

- RCW 11.92.053 has a precondition that an accounting meet the requirements of RCW 11.92.040(2).

- RCW 11.92.040 requires the guardian to file a written, verified account, identifying the property in the guardianship, additional property received including income, all expenditures, adjustments to estate to establish its fair market value, any encumbrances, and finally, identification of all property held at the end of the accounting period and the total net fair market value.

- The Banks failed to require or see to it that the Special Ad properly reported on GAHC via an accounting to the court. CP 37.

- The Banks failed to cite the Special Ad into court, as allowed under RCW 11.92.160, or even petition the court for instructions on how to proceed.[247]

The Banks cannot shift their duties to the Special Ad. That failure in and of itself renders all the final orders entered as void. Therefore, the statute of limitations has not begun to run against any of the fiduciaries in this matter.

Discovery Rule. The court has a duty to construe and apply

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[245] Patchett, 60 Wn.2d.at 787.
[246] Patchett, 60 Wn.2d at 787 (citations omitted); Grady, 24 Wn.2d at 288-290.
[247] RCW 11.48.070, 11.92.185; Carlson, 162 Wash. at 28.

limitation statutes in a manner that furthers justice.[248] In determining whether to apply the Discovery Rule, the court balances the possibility of stale claims against the unfairness of precluding justified causes of action. The balancing test dictates application of the Discovery Rule where the plaintiff lacks the means or ability to ascertain that a wrong had been committed. This has been applied in the context of cases involving professional services and fiduciaries.[249]

Statutes of limitation operate on the premise that a competent person has knowledge of a justifiable grievance in contrast to an incompetent person who lacks knowledge.[250] Here, Joe relied on the fiduciaries' self-reporting while he was incapacitated. If the Discovery Rule is not applied, then Joe would be denied a meaningful opportunity to bring a suit. Not applying the Discovery Rule penalizes the incapacitated plaintiff and awards a clever defendant.

The statute of limitations is tolled when a plaintiff can prove intentional concealment.[251] It is a question of fact whether the defendant fraudulently or intentionally concealed the underlying cause of action as

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[248] U.S. Oil & Ref. Co. v. Dep't of Ecology, 96 Wn.2d 85, 93, 633 P.2d. 1329 (1981) (citations omitted).
[249] Id.
[250] Id.
[251] Doe v. Finch, 133 Wn.2d 96, 101, 942 P.2d 359 (1997).

well as when a plaintiff discovers concealment.[252] In Doe, these conclusions were reached in the context of a malpractice action, which is akin to negligence and breach of fiduciary duty claims. The newly discovered evidence raised additional issues of fact with regard to application of the statute of limitations.

Joe was incapacitated when BOA, KEY, USB and FD were discharged and remained incapacitated until 2001. Joe relied on the fiduciaries self-reporting of information. As an incapacitated person, he was not in a position to obtain this information himself. His circumstances are all the more compelling because Arthur Davies represented multiple succeeding guardians.[253] The same GAL was involved with succeeding guardians and Special Ad. This lessens the likelihood of misdeeds of an earlier fiduciary coming to light. This eroded the checks and balances that might otherwise exist with succeeding guardians/fiduciaries.

The statute of limitations should not be applied to insulate a guardian or fiduciary when they failed to inform and disclose to the court, knowing that if they did disclose information, one would presume the

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[252] Id.
[253] Appendix 2.

court would want an investigation into those issues.[254] Whether Joe should have discovered a cause of action prior to expiration of the statute of limitations is a question of fact.[255] This point strongly supports the assertion that Joe should have survived summary judgment.

The Banks and FD are trying to hold Joe to a standard of full legal capacity, while he was deprived of his legal rights and control of his assets. That standard cannot be imposed on a one who is incapacitated. The imposition of that standard cannot occur until after legal rights have been returned to an incapacitated person and they have the ability to review the record. Upon review of the record here, it is filled with irregularities, failures to report as well as failures to follow the statutes and law. Under these facts, the orders obtained by the fiduciaries are void and the statute of limitations has not commenced. The orders should be vacated and the case remanded for further proceedings.

E. Settlement Agreement

As a result of the loss of summary judgment to the Banks, Joe took an opportunity to negotiate and avoid paying the Banks' fees as ordered. CP 785-790. A Settlement Agreement ("SA") was negotiated in January 2005. CP 941-946. However, Joe's appellate counsel discovered new

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[254] ($500,000 in fees, $500,000 guaranty, and new corporation). CP 980-984, 1191-1196, 1293-1295.
[255] Kittinger v. Boeing Co., 21 Wn. App. 484, 488-89, 585 P.2d 812 (1978).

facts in 2005 indicating BOA's involvement with GAHC exceeded what had been disclosed to the guardians and court. Joe's counsel contacted the Banks and asked them to wait on completing settlement as counsel understood that one Bank had not yet signed the SA.[256] The Banks response was a motion to enforce the SA.[257]

At the first hearing on the Banks' motion to enforce the SA, the court ordered the Banks to produce each Bank's attorney file for the guardianship. CP 1366-1369. BOA produced 2,378 pages; KEY-50 pages, eighteen of which were various forms of duplication; USB-approximately 3,445 pages. CP 1275. Within these documents Joe's counsel discovered critical information not disclosed to the court during the guardianship.[258] As a result, Joe resisted enforcement of the SA.

The thrust of Joe's claim is that between 1986 and 1997, the Banks submitted reports and orders to the court for approval concerning Joe's interest in GAHC without providing the court with all material information in their possession, plus failed to disclose unauthorized transactions, indicating the Banks' failure to fulfill their duties.[259] The Banks, to cover their malfeasance, inserted an "as is" clause in their

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[256] CP 969, 1964-1965.
[257] CP 2999-3030.
[258] The newly discovered evidence has been discussed in the brief at length, outlined in the Timeline at Appendix "1", and set forth in the Irregularities documents at CP 1032-1120, 1121-1223, 1224-1274.
[259] CP 1191-1196, 1293-1295, 1081.

carefully crafted SA. CP 941-946. In deciding whether to sign the SA, Joe should have been able to rely on the accuracy and veracity of the Banks' reports and representations to the court as guardians and officers of the court.[260] As a result of his reasonable reliance on the court file, Joe signed the settlement agreement. However, the Banks failed to disclose material information and are attempting to use the "as is" clause in the SA to cut off Joe's right to object or rescind the SA. Clearly, the Banks should not be able to benefit from their wrongful conduct.

The SA is void based on misrepresentation and potentially fraud by the Banks. Equitable estoppel prevents enforcement of the SA as do public policy considerations and the Rules of Professional Conduct.

Standard of Review. The applicable standard of review is de novo, because the evidence before the trial court regarding the SA consisted entirely of declarations and the proceeding is similar to a summary judgment proceeding.[261]

Banks' Fiduciary Duty to Disclose. As guardians and fiduciaries, the Banks owed Joe an affirmative duty to disclose in negotiating the SA.

> **An affirmative duty to disclose arises where there is a special relationship of trust and confidence, where one party is relying upon the superior specialized knowledge and experience of the other, where a seller has knowledge of material facts not easily**

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[260] Haegele, 150 Wash. at 360; SeaFirst Nat'l Bank, 89 Wn.2d at 200.
[261] Brinkerhoff v. Campbell, 99 Wn. App. 692, 696, 994 P.2d 911 (2000).

discoverable by the buyer, and finally where there exists a statutory duty to disclose.[262]

Clearly, a special relationship existed between Joe and the Banks. The Banks, as guardians were entrusted with Joe's financial well-being. They had the duty to protect and preserve his estate and account for it faithfully.[263] In addition, there is a general requirement of good faith in disclosing relevant facts while negotiating a contract.[264] This obligation has been applied in transactions involving real property where there was liability for failure to disclose termite damage or fill dirt.[265] Like a real property seller, a guardian is in a vastly superior position to know financial information. In essence, there is a disparate bargaining position, plus the guardian has a duty to protect the wards' assets.[266] All of this supports the Banks having a duty to disclose. The discovered information reveals that they breached this duty.

Good Faith and Fair Dealing. The Banks' efforts to entice Joe to sign the SA is a breach of the duty of good faith and fair dealing that exists in all contracts governed by Washington law.[267] This duty extends to negotiating a contract and applies where there is a fiduciary relationship

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[262] Id. at 698.
[263] SeaFirst Nat'l, 89 Wn.2d at 200.
[264] Liebergesel v. Evans, 93 Wn.2d 881, 892-93, 613 P.2d 1170, 1173 (1980).
[265] Id.
[266] Carlson, 162 Wash. at 28.
[267] Badgett v. Security State Bank, 116 Wn.2d 563, 569, 807 P.2d 356, 360 (1991).

between parties.[268] Superior knowledge is a factor and failure to disclose constitutes a breach of the duty to deal in good faith even where there is not a breach of fiduciary duty.[269] The duty to disclose applies even where non-disclosed information is of public record.[270]

The public policy interest in the full disclosure and good faith provisions of contract law in Washington certainly applies to the SA authored by the Banks. It is further noteworthy that the Banks' incentive provided to encourage, entice or induce Joe to sign included forgiveness of the Banks' attorney's fees arising out of their obtainment of summary judgment orders against Joe, where Joe cannot pursue his claims arising out of the Banks' failure to properly report to the court.

Fraud or Misrepresentation. Fraud or misrepresentation are bases for voiding a party's duty under contract. This applies where the fraud is in the inducement of a party to make a contract,[271] where there is a negligent or reckless misrepresentation,[272] and even where there is an innocent misrepresentation.[273]

At the very least, here there was material misrepresentation by the Banks and innocent misrepresentations by their current counsel,

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[268] Liebergesel, 93 Wn.2d at 881, 889, & 892.
[269] Id.at 891 and 893.
[270] Id. at 895.
[271] Salter v. Heiser, 39 Wn.2d 826, 829, 239 P.2d 327 (1952).
[272] Alexander Meyers & Co., Inc. v. Hopke, 88 Wn.2d 449, 454, 565 P.2d 80 (1977).
[273] Kruger V. Redi-Brew Corp., 9 Wn. App. 322, 326, 511 P.2d 1405 (1973).

establishing a basis for voiding Joe's duties under the SA. The Banks sought to enforce the agreement based upon declarations. An evidentiary hearing is required if the court determines there are genuine issues of material fact. This would apply if there are unresolved issues concerning the omissions and misrepresentations of the Banks, and what the Banks knew.[274] In this circumstance, a trial court abuses its discretion if it enforces the settlement agreement without first holding an evidentiary hearing to resolve the disputed issues of fact.[275] However, Joe's position is the evidentiary hearing was not necessary if the court could determine that the evidence on its face established the Banks' misrepresentations sufficient to preclude enforcement of the SA. If so, then the court should not enforce the SA and does not need an evidentiary hearing.

The Banks breached their duty to Joe by their misrepresentations and deliberate omissions.[276] The Banks' omissions and misrepresentations detailed above are a basis to void Joe's obligations under the SA:

- **BOA** did not disclose its involvement with GAHC.[277] *Hidden.*
- **BOA** devalued the stock to $1.00 without fully reporting. CP 1210.
- **BOA** stops monitoring GAHC due to difficulty obtaining financial statements and attempted to be exonerated from liability instead of monitoring GAHC. BOA's letter indicates: ...to avoid *rocking the*

[274] Brinkerhoff, 99 Wn. App. at 697.
[275] Id.
[276] CP 1191-1196, 1293-1295, 1081.
[277] CP 975-976, 1177, 1179, 1184, 1186, 1188-1189, 1223.

boat...an annual court order releasing us from all liability for GAHC is the right way to approach the management of this asset.[278] *Hidden.*

- **BOA**, **KEY** and **USB** did not report to the court that the Special Ad were not reporting quarterly as required by court order. CP 37.

- **BOA** was aware of over $500,000 in professional fees expensed by GAHC.[279] *Hidden.*

- **BOA** knew about a proposed 40% transfer of Joe's stock in GAHC, which later changed to 60%. BOA failed to investigate the proposal or report it to the court and left the matter for KEY. [280]

- **KEY** executed an unauthorized guaranty of $500,000 in Key Bank's favor and failed to disclose to the court. CP 1293-1295. *Hidden.* Then, seventeen days later **KEY** was in court seeking approval for a Centennial Bank guaranty of $500,000. CP 348-350.

- **KEY** and **USB** failed to disclose SD formed during the period the retroactive resignation of KEY resulted in no effective guardian. CP 980-984. *Hidden.* USB was aware of Joe's interest and failed to report, marshal or monitor SD.[281]

- **USB** failed to disclose transfer of land which they internally noted.[282] *Hidden.*

- **USB** received financial statements for GAHC prior to stating in its first and second report it had not received financial statements and should not be held accountable for GAHC.[283] *Hidden.*

The Banks had a fiduciary duty to disclose to Joe information

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[278] CP 11-17, 293-295, 1206, 1184.
[279] CP 1206, 1822-1823, 2008-2009.
[280] CP 20, 329-331, 2694-2697.
[281] CP 758-761, 116-161, 2722-2798.
[282] CP 1074-1075, 1081.
[283] CP 118, 2722-2798, 1087, 1089-1090, 1074-1075.

when negotiating the settlement contract.[284] This duty continued beyond the termination of the guardianship and initiation of Joe's legal action. An "as is" clause does not immunize the Banks; the courts will not enforce a contract obtained by fraudulent concealment.[285]

Equitable Estoppel. The court should impose the doctrine of equitable estoppel precluding the Banks from benefiting through enforcement of the SA for wrongful acts committed by them during the course of their involvement with Joe's estate. Division II set out the necessary elements of the doctrine of equitable estoppel: (1) an admission, statement or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such...act; and (3) injury to other party arising from permitting the first party to contradict or repudiate such act.[286]

The actions of the Banks meet and exceed Division II's criteria. The Banks breached their fiduciary duty of utmost good faith and finest loyalty to Joe as well as their duty of candor and full disclosure to the court when they elected not to disclose their knowledge of excessive fees, financial transactions, financial statements and other information when

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[284] Brinkerhoff, 99 Wn. App. at 698; Liebergesel, 93 Wn.2d at 892.
[285] Sloan v. Thompson, 128 Wn. App. 776, 790, 115 P.3d 1009 (2005).
[286] See Mercer v. State, 48 Wn. App. 496, 739 P.2d 703 (1987).

they presented orders to the court for signature.[287] Further, they made material misrepresentations and failed to disclose and obtain authorization for all transactions involving guardianship assets.[288]

Rules of Professional Conduct Support Not Enforcing the Settlement Agreement. RPC 3.3 and 4.1 require submission of complete and accurate documentation to the court when it is apparent that the court will rely on the information that is presented for its approval.

Rule 3.3 prohibits a lawyer from knowingly making false statements of material fact or law to a tribunal and offering evidence known to be false, and requires disclosure of material facts when disclosure is necessary to avoid assisting...fraudulent acts by a client unless subject to confidentially...[289] These duties continue to the conclusion of the proceeding and in ex parte proceedings, a lawyer is required to inform of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.[290]

Rule 4.1 prohibits a lawyer from knowingly making false statements of material fact or law to a third person and requires disclosure...to a third person when disclosure is necessary to avoid

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[287] CP 1206, 1293-1295, 1087, 1074-1077, 1081
[288] CP 1206, 1293-1295, 980-984.
[289] RPC 3.3 (a). Confidentiality parameters are explained in Rule 1.6.
[290] RPC 3.3 (b) and (f).

assisting...fraudulent acts by a client...[291]

The Settlement Agreement Should Not Be Enforced. As Joe's guardians, the Banks deliberately failed to disclose material information to Joe and the court, including unauthorized transactions involving guardianship assets. Joe reasonably relied on the court record when negotiating the SA. The Banks' failure to disclose is a misrepresentation that supports voiding the SA. The "as is" clause does not alter this conclusion, which is further bolstered by the doctrine of equitable estoppel and the Rules of Professional Conduct.

F. Amended Complaint.

Standard of Review. Review of a trial court's denial of a motion to amend a pleading is abuse of discretion.[292]

CR 15(a) provides that a party may amend his pleading once as a matter of course. "Otherwise, a party may amend his pleading only by leave of court or by...and leave shall be freely given when justice so requires."[293] This mandate is to be heeded.[294] A motion for amendment is addressed to the sound discretion of the trial court.[295] FRCP 15 'was designed to facilitate the amendment of pleadings except where prejudice

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[291] RPC 4.1(a) and (b). Rule 4.1 is subject to confidentiality set forth in Rule 1.6.
[292] See Del Guzzi Constr. Co. v. Global Nw. Ltd. Inc., 105 Wn.2d 878, 719 P.2d 120 (1986).
[293] CR 15(a).
[294] Tagliani v. Colwell, 10 Wn. App. 227, 233, 517 P.2d 207 (1973), (citation omitted).
[295] Lincoln v. Transamerica Inv. Corp., 89 Wn.2d 571, 573 P.2d 1316 (1978).

to the opposing party would result' and CR 15 was designed to facilitate the same ends.[296]

Regardless of the facts or circumstances, though, the "touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party."[297] But, in the absence of any apparent injustice—such as undue delay, bad faith or dilatory motive—the leave sought should be freely given.[298] The purpose of pleadings is to 'facilitate a proper decision on the merits.'[299] The purpose is not to erect formal and burdensome impediments to the litigation process.[300]

Joe moved to amend his complaint adding the discovery doctrine as necessitated by the undisclosed information. The amendment does not create an injustice because the information that was not disclosed was in the Banks' possession the entire time they were guardians and to this day. On the other hand, lack of amendment is an injustice to Joe. The hidden documents did not come to light until March 2005 or later.[301]

The discovery of this information held in the Banks' files supported amending the complaint. Amendment of the complaint could

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[296] United States v. Hougham, 364 U.S. 310, 316, 81 S.Ct. 13 (1960); Caruso v. Local Union No. 690, Int'l Bhd. of Teamsters, 100 Wn.2d 343, 349, 670 P.2d 240 (1983).
[297] Caruso, 100 Wn.2d at 350 (citations omitted).
[298] Tagliani, 10 Wn. App. at 233.
[299] Conley v. Gibson, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)
[300] Caruso, 100 Wn.2d at 349 (leave to amend should be freely given " 'except where prejudice to the opposing party would result' ").
[301] The newly discovered evidence is discussed in detail in the "Guardianship Law Applicable to the Parties" with reference to each fiduciary.

not prejudice the Banks considering they were holding this information for a number of years and as corporate fiduciaries were aware of the repercussions of nondisclosure.

The timing of the filing of the amended complaint cannot be considered unduly delayed on Joe's part since the fiduciaries were holding information in their files that should have been disclosed to the court and GAL in the normal course of the guardianship. There is no bad faith or dilatory motive here. Joe simply seeks the proper accountings and disclosure related to his guardianship estate during the time he was incapacitated from the parties who not only had a duty to act in his best interest, but a duty to disclose—both of which they failed to fulfill.

The Banks' failure to disclose created Discovery Doctrine issues in terms of the causes of action in this matter. Therefore, the statute of limitations would run from the discovery of these documents that were not disclosed to the court or to Joe's counsel prior to signing the SA.

Joinder. Similarly, in the motion to amend, Joe requested the addition of Arthur Davies and Owens Davies, P.S., as necessitated by the discovery of information not disclosed to the court. Joinder is allowed when in absence of joinder complete relief cannot be accorded among

those already parties.[302]

As a result of the recently discovered information, Davies' conduct as attorney for the guardians, personal representatives, and Special Ad is in question. Davies representation of the parties including Joe amounted to continuous conflicts of interest and compromise of Joe's best interests.[303] Additionally, Davies was paid fees through GAHC, which were not properly reported to or approved by the court. CP 1191-1196.

Denying Joe's motion to amend to add Davies and his firm amounts to abuse of discretion based on the newly discovered evidence and the multiplicity of conflicts of interest committed by Davies as well as failures to disclose fees collected.

Relief. Joe's motion to amend should be granted.

G. Attorneys' Fees

Standard of Review. A trial court's award of fees and costs are reviewed for an abuse of discretion.[304]

Initially, the trial court denied the award of fees to any of the Banks on the summary judgment motions.[305] However, in response to USB's motion for reconsideration, the court changed its mind and presumably awarded fees pursuant to RCW 11.96A.150. CP 785-790. The Banks

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[302] CR 19.
[303] Appendix 2.
[304] Schmidt v. Cornerstone Invs., Inc., 115 Wn.2d 148, 169, 795 P.2d 1143 (1990).
[305] CP 736-737, 738-740, 753-756, 878-928, 925.

sought to enforce the SA. CP 929-935. The court allowed a continuance on behalf of Joe and required Bank attorneys to produce their internal records. CP 166-169. As a result of the production of those documents, numerous new important facts came to light that were not in the court file or disclosed by the Banks during the guardianship.[306]

The overriding factual context is that all three Banks failed to follow court orders, failed to follow statutes and case law, and sought and received exonerating language against their own ward and BOA obtained a release in violation of statute, court rule, and case law.

RCW 11.96A.150. Pursuant to RCW 11.96A.150, costs and reasonable attorney's fees may be assessed against any party to the action.

> (1) Either the superior court **or the court on appeal** may, in its discretion, order costs, including reasonable attorney's fees, to be awarded to any party: (a) From any party to the proceedings...in such a manner as the court determines to be equitable.
>
> (2) This section applies to all proceedings governed by this title, including but not limited to...properties, and guardianship matters. This statute [section] shall apply to matters involving guardians and guardians ad litem and shall not be limited...

Case law interpreting RCW 11.96A.150 reflects the court does not award fees in instances where difficult issues are presented.[307] In contrast, fees have been awarded where a personal representative breached his

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[306] The newly discovered evidence is detailed in the "Guardianship Law Applicable to the Parties" section.
[307] Burks v. Kidd, 124 Wn. App. 327, 333, 100 P.3d 328 (2004) (citation omitted).

fiduciary duty repeatedly.[308]

Fees Awarded to Banks. The Banks should not have been awarded attorney's fees for defending their hidden activities in the guardianship action. Joe respectfully submits that fees assessed against him are not warranted and the case presents difficult issues. Newly discovered information compelled Joe to seek a continuance to investigate further.

On the summary judgment motion, it is clear there were multiple genuine issues of material fact related to the failures by the fiduciaries. In regard to the settlement agreement, again, information hidden from the court, the GAL, and Joe was discovered in 2005. Normally, absent application of the SA, Joe would be entitled to fees for discovery of undisclosed information provided he prevailed on the SA.[309] As to the SA, it is clear from the record that the court's rulings do not take into consideration the significance of the newly discovered evidence.

- **BOA** did not report on GAHC or $500,000 professional fees. *Hidden.*
- **BOA** did not disclose the extent of its involvement in the corporate governance of GAHC. *Hidden.*
- **BOA** did not report on their plan to get a release before resigning. *Hidden.*
- **BOA** did not report on the plan to transfer Joe's controlling

[308] Estate of Jones, 152 Wn.2d 1, 20, 93 P.3d 147 (2004).
[309] RCW 11.96A.150.

interest of the stock to a management team.

- **KEY** failed to report on an additional unauthorized $500,000 guaranty they made for Key Bank. CP 1293-1295. *Hidden.*

- **KEY** and **USB** did not report on the establishment of SD or marshal the new asset.

- **KEY** allowed a five-month gap to occur between its retroactive discharge and the appointment of a new guardian.

- **KEY** did not complete an accounting for the period from the end of their last reporting period to the time the assets were transferred to USB.

- The stock of GAHC disappeared—**KEY** accepted the stock, but there is no evidence they transferred it.

- **KEY** failed to report on GAHC as required and allowed the transfer of 60% of GAHC without full evaluation and report.

- **USB** did not file any receipts for the transfer of assets from **KEY** and failed to report **KEY** did not file an accounting.

- **USB** repeatedly said they had no financial statements in their annual reports – but did. *Hidden.*

- **USB** filed its final report years after it received its final order and never filed a third report.

- **BOA, KEY** and **USB** received an ex parte final orders.

Many of the above failings are in the court file; others were hidden. For such glaring failures with regard to accounting and disclosure, it is inequitable to award fees.

Summary judgment should not have been granted considering the innumerable material issues of fact - the lower court did not review the file

prior to awarding summary judgment.[310] If the court feels summary judgment was proper, Joe still should not be required to pay the fees of the Banks or FD under this set of circumstances. These are complicated issues of law regarding void orders and the court's interpretation of what occurred in this case is complex. Fees were improperly awarded to the Banks and those orders should be vacated.

The court can award fees at its discretion. Joe should be awarded his attorney fees for resisting the enforcement of the SA as well as fees for his motion to set aside the void orders and for an accounting and defense of summary judgment motions. Joe respectfully requests that under the circumstances including the court's varying comments, the difficult issues presented, and the information discovered by Joe, that the court vacate the fee awards to the Banks and award him his attorney fees and costs.

Reasonableness of Fees Awarded. Joe also challenged the attorney and staff fee rates for BOA and USB as not being commensurate with what is charged in the legal community for either Pierce or Thurston Counties.[311] Had the Banks followed statutory procedure as clearly outlined in the guardianship statute, it would have not been necessary to expend the time to defend their actions as guardians. The Banks

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[310] RP, November 2, 2006 Superior Court Proceedings, page 11.
[311] Due to the page limitation, appellant refers the court to following clerk's papers for briefing on this issue. CP 2202-2224, 2364-2370.

attempted to circumvent their statutory obligations with a settlement agreement and exonerating language at the expense of Joe. Certainly, Joe should not be liable for the attorney fees and costs incurred by the Banks as a result of their failure to fulfill their statutory duty as guardians.[312] The fees awarded to KEY and BOA should have been reduced as not being necessary and reasonable.

The trial court abused its discretion by awarding fees based on USB, KEY, and BOA's misconduct in failure to disclose important information in their possession to the Thurston County Superior Court during their tenure as guardians. Joe should be awarded his fees in resisting the Banks' attempt to enforce their settlement agreement.

Fees on Appeal. This court should award fees and expenses to Joe as a result of having to file an appeal. RAP 18.1(a) authorizes an award of attorney's fees if "applicable law grants to the party the right to recover reasonable attorney fees." RCW 11.96A.150 specifically confers upon appellate courts the discretion to award costs, including reasonable attorney's fees to parties on appeal.

Attorney's fees may be awarded to protect the estates at issue; Washington law favors the protection of estates and trusts through the

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[312] See Allard v. Pac. Nat'l Bank, 99 Wn.2d 394, 407, 663 P.2d 104 (1983) (trial court abuses its discretion when it awards attorney's fees to fiduciary, a trustee, for litigation caused by trustee's misconduct).

award of attorney's fees and costs.[313] In Laue, the trial court awarded attorney's fees to the estate when the estate was forced to defend itself against a legal challenge that would have depleted the estate.[314] The award offsets the losses to the estate as a result of attorney's costs and fees in its defense.

Here, attorney's fees are appropriately awarded to Joe resulting from the necessity to pursue the Banks to this degree in an effort to obtain fiduciary accountability during his incapacity where the respondents utterly disregarded statutory procedure.

Relief. Joe asks that the fees awarded USB, KEY, and BOA on the summary judgment motions and the SA be returned and that his fees be granted for the motion to set aside, resisting the summary judgment motions, resisting enforcement of the SA, and that he be awarded fees for his appeal.

H. Appearance of Fairness

If the appellate court remands this case to the superior court, Joe requests assignment to a new judge because the court contravened the appearance of fairness doctrine by its comments indicating it lacked impartiality during the course of proceedings.

The law requires not only an impartial judge, it also requires that

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[313] Laue v. Estate of Elder, 106 Wn. App. 699, 712, 25 P.3d 1032 (2001).
[314] Id at 712-713.

the judge appear to be impartial.[315] During the trial court's oversight of Joe's civil case, the judge made several comments that create an appearance of bias and unfairness.

At the June 5, 2005 and January 6, 2006 hearings, the judge accused Joe of entering into a "fishing expedition" when he was attempting to provide defenses to the judge for not enforcing the SA.[316] Initially, the judge said that Joe would only pay attorney fees and costs for discovery and later ruled he would be responsible for all the fees of the Banks, beyond the discovery issue. CP 2226-2227. The court repeatedly threatened Joe with attorney fees unless he stopped asserting his legal rights. CP 2229-2230.

Also, the trial court granted an evidentiary hearing and then withdrew it.[317] Originally, the court said it would grant BOA's motion to enforce the settlement if it was proven the GAL knew about the Drews and Davies fees as discussed in BOA's hidden internal memo. CP 1734. Conversely, Joe should have been able to assume that if the GAL did not know about the fees then the SA would not be enforced as to BOA.

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[315] State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972); See also In re Custody of R., 88 Wn. App. 746, 762, 947 P.2d 745 (1997) (justice must satisfy the appearance of impartiality); See also Chicago, Milwaukee, St. Paul and Pac. R.R. Co. v. Wash. State Human Rights Comm'n, 87 Wn.2d 802, 557 P.2d 307 (1976) (judiciary should avoid even mere suspicion of irregularity, or appearance of bias or prejudice.)
[316] CP 1381, 1684, 2189.
[317] RP, November 7, 2005 Superior Court Proceedings, page 62.

However, when it was proven that the GAL did not know about over $500,000 fees paid by GAHC, the court changed its ruling and enforced the SA, based on Holt's failure to complete discovery.[318]

Finally, the court's comments regarding a lack of review of the record prior to ruling on Summary Judgment raises further issue with regard to the appearance of fairness.[319]

The trial court contravened the appearance of fairness by threatening Joe with fees, summarily ruling contrary to prior statements of the court, and relying on counsel's statements instead of independently reviewing the file as stated by the court on November 2, 2006.

I. Conclusion.

Joe asks the appellate court to:

- Reverse the orders of summary judgment and remand for further proceedings;
- Set aside as void the final orders of BOA, KEY, USB, Drews, and FD purporting to discharge them, determining that the conditions of discharge have not been met and require them to account (to include GAHC and SD);
- Order that FD as Special Ad must fully account for their activities, including fees, and that the Banks and Drews as guardians share in responsibility for a complete accounting;
- Rule that Joe's claims are timely and not precluded by statutes of limitation;

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[318] CP 2547, RP, November 7, 2005 Superior Court Proceedings, page 62.
[319] RP, November 2, 2006 Superior Court Proceedings, page 11.

- Permit Joe to amend his complaint to include the discovery doctrine and add Davies and his firm as a party;

- Rule that the settlement agreement is void for the Banks' failure to disclose, permitting Joe to proceed against all parties pursuant to his lawsuit;

- Vacate the fee awards and order the Banks to return Joe's money with interest; and award Joe fees for resisting summary judgment, bringing the motion to set aside, defending the settlement agreement action, and bringing this appeal.

Respectfully submitted this 21 day of December, 2006.

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APPENDIX 1

TIMELINE

Kwiatkowski Timeline

Updated December 21, 2006

Blue = probate file
Black = guardianship file
Red = newly discovered information (2005)
Green = Joe's lawsuit

SeaFirst = BOA
PSNB = KEY
Sirius Enterprises = GAHC
Frost & Drews = FD

DATE	EVENT
Prior to April 1986	FD became Great American Herb Company's CPAs. CP 578. Art Davies represents Joe & Jana Kwiatkowski. CP 101 & 606.
April 23, 1986	Jana Kwiatkowski died. CP 577.
April 23, 1986	Joe seriously injured. CP 577.
May 7, 1986	Special Administrators FD appointed in Jana's probate as Special Administrators of Sirius Enterprises d/b/a The Great American Herb Company (GAHC). CP 244-246.
May 7, 1986	BOA appointed Co-Personal Representative of Estate of Jana Kwiatkowski. CP 244 - 246.
November 13, 1986	John Parr appointed GAL in guardianship. CP 22.
December 8, 1986	Guardianship established, Full Guardian of the Estate BOA, Limited Guardian of the Person, Joe's half-brother Mark Perelmuter. CP 2655.
December 21, 1986	GAHC minutes of special meeting of shareholders: Davies and Drews elected to Board of Directors. CP 975-976.
July 7, 1987	Letter from Ross Ohashi to Arthur Davies re: Sirius Enterprises (BOA), stock and guardianship. CP 1177.
December 31, 1987	GAHC 1986 and 1987 financial statements, schedule of expenses. CP 1223.
February 19, 1988	Letter from Ohashi to Davies re: Sirius Enterprises (BOA) keep apprised of status. CP 1179-1180.
February 19, 1988	BOA memo on status of GAHC. CP 1182.
March 28, 1988	Letter from Ralph Drews to Ralph Macy (BOA) on financial statements 1987. CP 1184.
April 19, 1988	BOA interoffice memo from Macy to Ohashi on financial statements 1986-87. CP 1186.
April 26, 1988	BOA interoffice correspondence from Ohashi to Gvovaag, 5-year forecast. CP 1188-1189.
April 26, 1988	BOA interoffice correspondence from Ohashi to Macy with 1988 annual review. $500K fees. CP 1191-1196.

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September 26, 1988	BOA interoffice correspondence from Ohashi to Macy re: decrease value of shares. CP 1198.
October 20, 1988	John Parr appointed Guardian ad Litem in probate to investigate final report of Personal Representative and actions of Special Administrators. CP 600.
November 23, 1988	Final Report of Personal Representative filed. CP 577-593.
November 29, 1988	BOA reports book value of Jana Kwiatkowski's one-half interest in Sirius Enterprises d/b/a The Great American Herb Company (250 shares) at $9,850,000. CP 247-249.
December 14, 1988	Guardian ad Litem Report on Probate Final Accounting filed. CP 600-604.
December 14, 1988	BOA's initial inventory as Guardian of the Estate reports Joe's 250 shares in Sirius Enterprises d/b/a/ The Great American Herb Company at $9,850,000. CP 9-10.
December 15, 1988	Notice of First Annual Accounting filed by BOA (CP 277). Parr appointed as Guardian ad Litem. CP 22.
December 15, 1988	First Report of BOA filed. Refers to self as limited guardian. CP 278-288.
December 22, 1988	Parr filed GAL Report on First Report of BOA. CP 284-288.
December 27, 1988	Order Approving BOA Accounting filed; set on regular motion calendar. Parr not present at hearing, but signed off on order telephonically. CP 2659-2661.
April 5, 1989	BOA interoffice correspondence from Ohashi to Macy, and April 6, 1989 handwritten response—lack of 1988 financial statements. CP 1200
July 12, 1989	BOA interoffice correspondence from Anthony Waltier to Macy re: 1988 financial statements. CP 1202.
July 25, 1989	Closely held asset review (BOA) shares valued at $15,350,000. CP 1204.
December 14, 1989	Notice of Hearing on Second Report of BOA filed. CP 289.

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December 14, 1989	Second Report of Guardian of Estate filed. BOA acknowledges receiving Jana's one-half interest (250 shares) valued at $9,850,000. CP 11-17.
December 14, 1989	Parr appointed GAL to review BOA accounting. CP 290.
December 22, 1989	Guardian ad Litem Report on Second Report of BOA filed. CP 290-292.
December 26, 1989	Order on Second Report of BOA. CP 293-295.
December 26, 1989	Drews appointed limited Guardian of the Person, replacing Joe's half-brother, who had resigned. CP 293-295.
January 4, 1990	BOA interoffice correspondence from Macy to Jerry Jovaag—not required to monitor GAHC—"Rock the Boat". CP 1206.
March 19, 1990	BOA memorandum from Lundberg to Bagley—restriction of stock asset, no need to monitor. CP 1208.
March 19, 1990	BOA memorandum from Lundberg to Istrig—change market value of stock to $1.00. CP 1210.
April 11, 1990	Order Approving Final Report and to Create Distribution entered in Jana's probate. CP 616-620.
April 12, 1990	Order Approving Special Administrators' Report, Petition for Approval of Further Authority—Special Administrators' duties moved from Jana's probate to Joe's guardianship. CP 18-23.
April 13, 1990	Report of Special Administrators filed (dated November 30, 1988); runs through December 31, 1987. In probate file only. Special Administrators FD reported in probate they paid Joe approximately $2.8 million during 1986-1987 and that Joe is receiving an annual salary of $60,000. There is no receipt of funds or notice of change in circumstances appearing from Guardian of Estate BOA. CP 605-613.
September 19, 1990	Correspondence from Davies to Macy with attachments of a promissory note for $150,000, UCC 1 filed 9/17/90 with Department of Licensing, and minutes of special meeting of board of directors—60% of stock to management team. CP 1214-1221.

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February 26, 1991	Third Report of Limited Guardian of Estate: BOA reduces book value of 500 shares of Sirius Enterprises d/b/a The Great American Herb Company from $19,700,000 to $1.00. No explanation provided. CP 24 - 31.
February 26, 1991	Notice of Third Report of BOA filed. CP 299.
February 26, 1991	Guardian ad Litem appointed to review Third Report of BOA. CP 2685-2686.
March 7, 1991	Order Combining Promissory Notes (CP 32-43): Court orders Special Administrators to report quarterly to Guardian of Estate BOA and Guardian ad Litem on condition of GAHC. CP 37.
March 8, 1991	Third Guardian ad Litem Report on BOA. CP 300 - 302.
March 11, 1991	Order Approving Third Report of BOA. CP 2687-2689.
September 16, 1991	Fourth and Final Accounting and Report of BOA filed; reports that it has received no financial statements from GAHC (CP 46 - 50), release mentioned (CP 49 - 50). CP 44 - 95.
September 16, 1991	Ex parte Order Approving Fourth and Final Report of BOA. CP 309-319.
September 16, 1991	Waiver of Notice and Acknowledgment of Receipt of Fourth and Final Report. CP 320 - 321
September 16, 1991	BOA Release as Exhibit "A" to Civil Declaration of Michael E. Kipling in Support of Bank of America's Motion for Summary Judgment filed April 29, 2004. CP 3003-3009.
October 18, 1991	KEY petitions to be appointed Guardian of Estate. CP 322 - 328.
October 18, 1991	KEY appointed Limited Guardian of Estate. CP 329 - 331.
October 28, 1991	Letter from Macy (BOA) to Vasey (KEY)—stock transfer. CP 1283 - 1284.
November 7, 1991	At hearing, Frost reports orally that Joe's shares in GAHC were $750 per share, giving the ownership interest of $375,000. Not explained. CP 106. Frost tells the court there was under $300,000 in tax refunds distributed to Joe's guardianship. Guardian of Estate did not report receipt of those funds. CP 108.

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November 13, 1991	60% of Joe's interest in GAHC was transferred to third parties. There was no consideration reported in the order. CP 96-97.
November 13, 1991	BOA discharged as Co-Personal Representative of Jana's estate. CP 621.
November 26, 1991	Letter from Macy (BOA) to Willett (KEY)—stock transfer. CP 1286-1287.
December 18, 1991	Letter from Willett (KEY) to Macy (BOA)—stock. CP 1289.
February 12, 1992	Receipt and Acknowledgement of KEY and accompanying correspondence from Macy (BOA) to Willett (KEY), acknowledging receipt of stock of GAHC. CP 1107-1111.
December 23, 1992	Note of Issue for First Annual Report of KEY. CP 340-341.
December 23, 1992	First Annual Report of KEY. CP 2713-2715.
January 13, 1993	Guardian ad Litem Report on First Report of KEY. CP 342-343.
January 19, 1993	Order Approving First Annual Report of KEY. CP 2719-2721.
March 26, 1993	Response to audit report signed by Bush (KEY)—info on GAHC. CP 1297-1298.
July 30, 1993	Commercial Guaranty signed by Bush (KEY) on behalf of the guardianship estate for KEY—not court approved. CP 1293-1295.
August 16, 1993	Order Amending Previous Order and Authorizing Signing of New Guaranty (KEY). CP 348-350.
October 1, 1993	KEY resigned as Guardian of the Estate. CP 352.
January 10, 1994	Sirius Development (new company) incorporated. Joe has 40% interest. $85,600 was used for Joe's share of Sirius Development. A new corporation was started without court approval and without guardian KEY or USB marshalling asset. CP 977.
January 1994	Organization Consent of Directors Sirius Development Corporation. CP 980-984.

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February 18, 1994	KEY filed an ex parte order approving the Second and Final Report and Petition for Discharge. No notice or hearing. CP 351-352. KEY was to file receipts for transfer of assets to USB for net assets and income realized September 30, 1993. That was never done. CP 113-115.
February 18, 1994	USB appointed Successor Limited Guardian of Estate by ex parte order with order effective November 1, 1993. USB was to file receipts for transfer of estate assets from KEY. That was never done. CP 113-115. Order requiring USB to file declaration regarding Joe's guaranty for a line of credit for GAHC. No declaration was filed. CP 114.
February 25, 1994	Key filed Second and Final Report and Petition for Discharge, which says a supplemental report from October 1, 1993 to the day of transfer would be filed. It was never filed. CP 354-357.
June 21, 1994	Petition by USB to modify a prior order. USB petitioned to allow Joe to guarantee a $720,000 SBA loan to Sirius Development. At no time did USB report Joe's ownership interest in Sirius Development as an asset of the estate. CP 758-761.
June 21, 1994	Order Granting USB's petition to modify prior court order—SBA loan signed ($720K), reduce Centennial line from $500K to $250K. CP 762-764.
July 27, 1994	Petition for Authority to Reduce Personal Liability on Line of Credit. USB petitioned to allow Joe to guarantee another loan to Sirius Development. Petition requests a reduction of Joe's personal guarantee of a line of credit to Sirius Development, new business, which USB does acknowledge but does not report on. Additional $60K liability on WA State Economic Development Grant. CP 765-767.
October 4, 1994	Customer Contact Report by Wong (USB)—promissory note. CP 1120.
February 11, 1995	Letter from Ralph Drews to Wong (USB) re: financial statements 1992, 1993, 1994. CP 1087.
February 24, 1995	Interoffice memo from Owens to Wong (USB)—discussion on financial statements. CP 1089 - 1090.

Kwiatkowski Timeline

Updated December 21, 2006

Blue = probate file
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Green = Joe's lawsuit

SeaFirst = BOA
PSNB = KEY
Sirius Enterprises = GAHC
Frost & Drews = FD

March 1, 1995	Letter from Wong (USB) to Arthur Davies re: renewal of note. CP 1092
March 17, 1995	Note of Issue on First Report of USB. CP 358-359.
March 17, 1995	First Report of USB stated to the court it had received no financial statements for GAHC (CP 118). CP 116 - 161.
March 17, 1995	Quit Claim Deed transferring property out of Sirius Development to Doug Groves. CP 1079.
April 4, 1995	Guardian ad Litem Report of USB's First report. CP 360 - 361.
April 10, 1995	Order Approving USB's First Report. CP 362 - 365.
December 6, 1995	Note of Issue on Second Report of USB filed. CP 366-367.
December 6, 1995	Second Report of USB. CP 2722-2798.
December 13, 1995	GAL Report on USB's Second Report filed. CP 368 - 369.
December 16, 1995	Order Approving USB's Second Report. CP 370 - 372.
February 23, 1996	GAHC & SDC combined financial statements 12/31/95 by Knight, Vale, Gregory. Table of contents, accountant's report letter (USB). Transfer of land reported value $38,250. CP 1074-1077.
April 5, 1996	Letter re: Drews sent financial statements (USB), bonus land to president of corporation, mentions Sirius Development. CP 1069.
June 27, 1996	Memorandum from Wong to Owens (USB)—transfer of land noted in GAHC (SE) (in reality SD). CP 1081.
July 5, 1996	Interoffice correspondence dated July 5, 1996 from Owens to Wong (USB)—concerns about special administrators & GAHC, unsecured loan. CP 1117 - 1118.
December 12, 1996	Superior Court Volunteer Auditor report—questions about file. CP 1098.
January 7, 1997	Petition to Remove USB as Guardian. CP 2799.
January 7, 1997	Affidavit in Support of Petition to Remove USB. CP 2800-2802.
January 7, 1997	Order to Show Cause to Remove USB. CP 2803-2804.
January 22, 1997	Response of USB on Removal. CP 2805-2816.
January 22, 1997	Declaration of Ralph Drews in Response to USB. CP 2817-2819.

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March 3, 1997	Findings of Fact and Conclusions of Law, replacing USB with Drews as guardian of estate. CP 373-376.
March 3, 1997	Drews appointed Successor Limited Guardian of Estate. Same order appointing Drews made USB's discharge contingent upon filing Ralph Drews' receipts for transfer of assets, approval of the accounting, and approval of summary accounting. Receipts (dated May and June 1997) not filed until March of 2000. USB required by order to produce to Drews and file an accounting from date of its last period through February 28, 1997. No complete accounting was filed. CP 377-386.
April 2, 1997	Donna Holt appointed ex parte as Joe's attorney. CP 2820-2821.
April 28, 1997	Stipulated Order entered ex parte discharging USB and approving Third and Final Report. Parr, Guardian ad Litem, did not file a report approving USB's Third Annual and Fourth and Final Accountings, and did not sign the order. There was no notice to Donna Holt, Joe's court-appointed attorney. The Third Annual Report was never filed. The Fourth and Final Accounting and Petition for Discharge of USB (CP 407-463) was not filed until five years later, and it is not dated. CP 387-390.
August 15, 1997	Final Report of Special Administrators. CP 162-165.
August 15, 1997	Order Approving Final Report of Special Administrators signed; presented without notice to the court on August 15, 1997. FD discharged; Parr discharged as GAL. CP 393-394.
August 15, 1997	Order making changes in guardianship by Holt—guardian of the person removed, Parr discharged. CP 395-399.
March 23, 2000	Three years after their discharge, USB files receipts dated May 12, May 25, and June 24, 1997. CP 2822, 2823, 2824.
January 26, 2001	Order Terminating Guardianship: full capacity returned to Joe. CP 166-167.
April 12, 2002	Motion for an Order to Show Cause why Drews should not be in contempt for failure to produce documents. CP 168-175.
May 3, 2002	Final Report of Limited Guardian of Estate filed by Drews. CP 1076-1096.
May 8, 2002	Response to Order to Show Cause by Davies. CP 2826-2834.

Kwiatkowski Timeline

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May 10, 2002	Told by court to resolve document dispute. CP 2835.
May 13, 2002	Fourth and Final Report of USB filed. Arthur Davies' signature not dated, but notary designation dated March 28, 1997. CP 407-463.
May 13, 2002	Final Report of Special Administrators filed by Drews. CP 197-200.
October 13, 2003	Complaint filed for damages against Frost, Drews, and three banks. CP 2840-2848.
November 21, 2003	Hearing regarding improper service—had to be personal service. CP 2849-2850.
January 21, 2004	Claim for Damages—Joe's complaint against Frost, Drews, BOA, Puget Sound, and USB (new filing). CP 213-221.
March 19, 2004	Order Compelling Discovery. CP 2895-2896.
April 5, 2004	Motion to Set Aside—Full Accounting. CP 2897-2899.
April 20, 2004	Order Denying Motion to Set Aside. CP 2900-2901.
April 21, 2004	Order Granting Summary Judgment (FD). CP 242-243.
April 30, 2004	Declaration of Wong has attached to it the Third Report of USB, filed for the first time. (Civil Subpart No. 34).
June 4, 2004	Order Granting BOA's Motion for Summary Judgment. CP 736-737.
June 4, 2004	Order Granting KEY's Motion for Summary Judgment. CP 738-740.
June 14, 2004	Order Granting USB's Motion for Summary Judgment. CP 753-756.
June 14, 2004	Order Denying Plaintiff's Motion to Set Aside Orders and for Full Accounting (as to Banks). CP 779-784.
June 14, 2004	Order Denying Kwiatkowski's Motion to Set Aside Orders and for Accounting (FD). CP 779-784.
July 7, 2004	Order Granting USB's Motion for Reconsideration on Fees. CP 785-790.
January 13, 2005	Settlement Agreement between Banks & Joe. CP 941-946.
April 5, 2005	Declaration of Donna Holt—FD. CP 535 - 538.

Kwiatkowski Timeline

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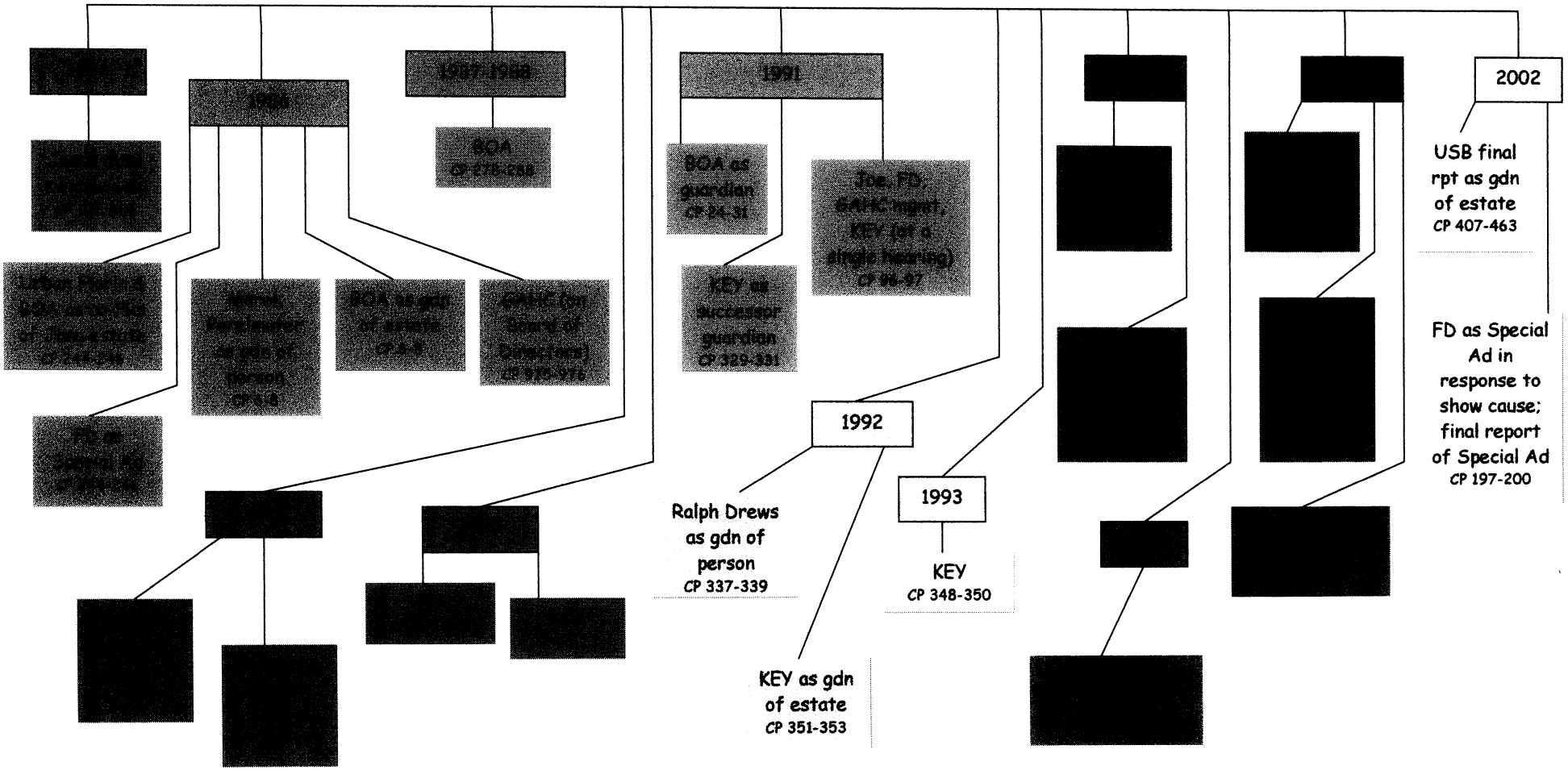
April 21, 2006	Declaration of Donna Holt—USB. CP 564-565.
May 4, 2005	Balsam letter holding off on settlement. CP 1964-1965.
May 12, 2005	Declaration of Michael Kipling—Exhibit A is release. CP 2999-3030.
May 25, 2005	Declaration of Michael Schein acknowledging newly discovered evidence. CP 1012-1016.
May 25, 2005	Declaration of Donna Holt in Response to Motion to Enforce Settlement Agreement. CP 968-970.
June 8, 2005	Declaration of Joseph Kwiatkowski. CP 1026-1027.
June 8, 2005	Declaration of Donna Holt outlining her efforts. CP 1028-1031.
Sept. 23, 2005	Declaration of Donna Holt in Response to Defendant Banks' Refusal to Produce Documents. CP 1351-1365.
Sept. 29, 2005	Order on Motion for Continuance (production of Banks' counsel's files). CP 1366-1369.
March 16, 2006	Medical Records of Joe from Parr file. CP 1865-1894.
May 10, 2006	Motion to Amend Complaint. CP 2145-2178.

APPENDIX 2

ARTHUR L. DAVIES RELATIONSHIPS

APPENDIX NO. 2
ARTHUR L. DAVIES RELATIONSHIPS
KWIATKOWSKI GUARDIANSHIP



APPENDIX 3

STATUTES

harshness of many common law doctrines, the legislature has periodically intervened in order to bring about needed reforms. The purpose of this chapter is to enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance.

The legislature finds that counties, cities, and other governmental entities are faced with increased exposure to lawsuits and awards and dramatic increases in the cost of insurance coverage. These escalating costs ultimately affect the public through higher taxes, loss of essential services, and loss of the protection provided by adequate insurance. In order to improve the availability and affordability of quality governmental services, comprehensive reform is necessary.

The legislature also finds comparable cost increases in professional liability insurance. Escalating malpractice insurance premiums discourage physicians and other health care providers from initiating or continuing their practice or offering needed services to the public and contribute to the rising costs of consumer health care. Other professionals, such as architects and engineers, face similar difficult choices, financial instability, and unlimited risk in providing services to the public.

The legislature also finds that general liability insurance is becoming unavailable or unaffordable to many businesses, individuals, and nonprofit organizations in amounts sufficient to cover potential losses. High premiums have discouraged socially and economically desirable activities and encourage many to go without adequate insurance coverage.

Therefore, it is the intent of the legislature to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured through the fault of others is available." [1986 c 305 § 100.]

Report to legislature—1986 c 305: "The insurance commissioner shall submit a report to the legislature by January 1, 1991, on the effects of this act on insurance rates and the availability of insurance coverage and the impact on the civil justice system." [1986 c 305 § 909.]

Application—1986 c 305: "Except as provided in sections 202 and 601 of this act and except for section 904 of this act, this act applies to all actions filed on or after August 1, 1986." [1986 c 305 § 910.]

Severability—1986 c 305: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1986 c 305 § 911.]

4.16.170 Tolling of statute—Actions, when deemed commenced or not commenced. For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations. [1971 ex.s. c 131 § 1; 1955 c 43 § 3. Prior: 1903 c 24 § 1; Code 1881 § 35; 1873 p 10 § 35; 1869 p 10 § 35; RRS § 167, part.]

4.16.180 Statute tolled by absence from state, concealment, etc. If the cause of action shall accrue against any person who is a nonresident of this state, or who is a resident of this state and shall be out of the state, or concealed therein, such action may be commenced within the terms herein respectively limited after the coming, or return of such person into the state, or after the end of such concealment; and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limit for the commencement of such action. [1927 c 132 § 1; Code 1881 § 36; 1854 p 364 § 10; RRS § 168.]

4.16.190 Statute tolled by personal disability. (1) Unless otherwise provided in this section, if a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued either under the age of eighteen years, or incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW, or imprisoned on a criminal charge prior to sentencing, the time of such disability shall not be a part of the time limited for the commencement of action.

(2) Subsection (1) of this section with respect to a person under the age of eighteen years does not apply to the time limited for the commencement of an action under RCW 4.16.350. [2006 c 8 § 303; 1993 c 232 § 1; 1977 ex.s. c 80 § 2; 1971 ex.s. c 292 § 74; Code 1881 § 37; 1877 p 9 § 38; 1869 p 10 § 38; 1861 p 61 § 1; 1854 p 364 § 11; RRS § 169.]

Findings—Intent—Part headings and subheadings not law—Severability—2006 c 8: See notes following RCW 5.64.010.

Purpose—Intent—1977 ex.s. c 80: "It is the purpose of the legislature in enacting this 1977 amendatory act to provide for a comprehensive revision of out-dated and offensive language, procedures and assumptions that have previously been used to identify and categorize mentally, physically, and sensory handicapped citizens. It is legislative intent that language references such as idiots, imbeciles, feeble-minded or defective persons be deleted and replaced with more appropriate references to reflect current statute law more recently enacted by the federal government and this legislature. It is legislative belief that use of the undefined term "insanity" be avoided in preference to the use of a process for defining incompetency or disability as fully set forth in chapter 11.88 RCW; that language that has allowed or implied a presumption of incompetency or disability on the basis of an apparent condition or appearance be deleted in favor of a reference to necessary due process allowing a judicial determination of the existence or lack of existence of such incompetency or disability." [1977 ex.s. c 80 § 1.]

Severability—1977 ex.s. c 80: "If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1977 ex.s. c 80 § 76.]

Severability—1971 ex.s. c 292: See note following RCW 26.28.010.

Adverse possession, personal disability, limitation tolled: RCW 7.28.090.

4.16.200 Statute tolled by death. Limitations on actions against a person who dies before the expiration of the time otherwise limited for commencement thereof are as set forth in chapter 11.40 RCW. Subject to the limitations on claims against a deceased person under chapter 11.40 RCW, if a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of the time and within one year from his death. [1989 c 333 § 8; Code 1881 § 38; 1877 p 9 § 38; 1854 p 364 § 12; RRS § 170.]

Application—Effective date—1989 c 333: See note following RCW 11.40.010.

Decedents, claims against, time limits: RCW 11.40.051, 11.40.060.

11.28.330 Notice of adjudication of testacy or intestacy and heirship—Contents—Service or mailing. If no personal representative is appointed to administer the estate of a decedent, the person obtaining the adjudication of testacy, or intestacy and heirship, within thirty days shall personally serve or mail a true copy of the adjudication to each heir, legatee, and devisee of the decedent, which copy shall contain the name of the decedent's estate and the probate cause number, and shall:

(1) State the name and address of the applicant;

(2) State that on the .... day of ....., ..., the applicant obtained an order from the superior court of ..... county, state of Washington, adjudicating that the decedent died intestate, or testate, whichever shall be the case;

(3) In the event the decedent died testate, enclose a copy of his will therewith, and state that the adjudication of testacy will become final and conclusive for all legal intents and purposes unless any heir, legatee, or devisee of the decedent shall contest said will within four months after the date the said will was adjudicated to be the last will and testament of the decedent;

(4) In the event that the decedent died intestate, set forth the names and addresses of the heirs of the decedent, their relationship to the decedent, the distributive shares of the estate of the decedent which they are entitled to receive, and that said adjudication of intestacy and heirship shall become final and conclusive for all legal intents and purposes, unless, within four months of the date of said adjudication of intestacy, a petition shall be filed seeking the admission of a will of the decedent for probate, or contesting the adjudication of heirship.

Notices provided for in this section may be served personally or sent by regular mail, and proof of such service or mailing shall be made by an affidavit filed in the cause;

(5) Mail a true copy of the adjudication, including the decedent's social security number and the name and address of the applicant, to the state of Washington department of social and health services office of financial recovery. [2004 c 193 § 1; 1974 ex.s. c 117 § 31.]

Application, construction—Severability—Effective date—1974 ex.s. c 117: See RCW 11.02.080 and notes following.

11.28.340 Order of adjudication of testacy or intestacy and heirship—Entry—Time limitation—Deemed final decree of distribution, when—Purpose—Finality of adjudications. Unless, within four months after the entry of the order adjudicating testacy or intestacy and heirship, and the mailing or service of the notice required in RCW 11.28.330 any heir, legatee or devisee of the decedent shall offer a later will for probate or contest an adjudication of testacy in the manner provided in this title for will contests, or offer a will of the decedent for probate following an adjudication of intestacy and heirship, or contesting the determination of heirship, an order adjudicating testacy or intestacy and heirship without appointing a personal representative to administer a decedent's estate shall, as to those persons by whom notice was waived or to whom said notice was mailed or on whom served, be deemed the equivalent of the entry of a final decree of distribution in accordance with the provisions of chapter 11.76 RCW for the purpose of:

(1) Establishing the decedent's will as his last will and testament and persons entitled to receive his estate thereunder; or

(2) Establishing the fact that the decedent died intestate, and those persons entitled to receive his estate as his heirs at law.

The right of an heir, legatee, or devisee to receive the assets of a decedent shall, to the extent otherwise provided by this title, be subject to the prior rights of the decedent's creditors and of any persons entitled to a homestead award or award in lieu of homestead or family allowance, and nothing contained in this section shall be deemed to alter or diminish such prior rights, or to prohibit any person for good cause shown, from obtaining the appointment of a personal representative to administer the estate of the decedent after the entry of an order adjudicating testacy or intestacy and heirship. However, if the petition for letters testamentary or of administration shall be filed more than four months after the date of the adjudication of testacy or of intestacy and heirship, the issuance of such letters shall not affect the finality of said adjudications.

Four months after providing all notices as required in RCW 11.28.330, any person paying, delivering, transferring, or issuing property to the person entitled thereto under an adjudication of testacy or intestacy and heirship that is deemed the equivalent of a final decree of distribution as set forth in this section is discharged and released to the same extent as if such person has dealt with a personal representative of the decedent. [2004 c 193 § 2; 1988 c 29 § 1; 1977 ex.s. c 234 § 7; 1974 ex.s. c 117 § 32.]

Application, effective date—Severability—1977 ex.s. c 234: See notes following RCW 11.20.020.

Application, construction—Severability—Effective date—1974 ex.s. c 117: See RCW 11.02.080 and notes following.

Chapter 11.32 RCW
SPECIAL ADMINISTRATORS

Sections

11.32.010 Appointment. When, by reason of an action concerning the proof of a will, or from any other cause, there shall be a delay in granting letters testamentary or of administration, the judge may, in his discretion, appoint a special administrator (other than one of the parties) to collect and preserve the effects of the deceased; and in case of an appeal from the decree appointing such special administrator, he shall, nevertheless, proceed in the execution of his trust until he shall be otherwise ordered by the appellate court. [1965 c 145 § 11.32.010. Prior: 1917 c 156 § 81; RRS § 1451; prior: 1891 p 384 § 19; Code 1881 § 1419; 1863 p 222 § 137; 1860 p 184 § 104.]

11.32.020 Bond. Every such administrator shall, before entering on the duties of his trust, give bond, with sufficient surety or sureties, in such sum as the judge shall order, pay-

able to the state of Washington, with conditions as required of an executor or in other cases of administration: PROVIDED, That in all cases where a bank or trust company authorized to act as administrator is appointed special administrator or acts as special administrator under an appointment as such heretofore made, no bond shall be required. [1965 c 145 § 11.32.020. Prior: 1963 c 46 § 2; 1917 c 156 § 82; RRS § 1452; prior: Code 1881 § 1420; 1863 pp 220, 222 §§ 126, 138; 1860 pp 183, 184 §§ 93, 105.]

Bond of personal representative: RCW 11.28.185.

11.32.030 Powers and duties. Such special administrator shall collect all the goods, chattels, money, effects, and debts of the deceased, and preserve the same for the personal representative who shall thereafter be appointed; and for that purpose may commence and maintain suits as an administrator, and may also sell such perishable and other goods as the court shall order sold, and make family allowances under the order of the court. The appointment may be for a specified time, to perform duties respecting specific property, or to perform particular acts, as stated in the order of appointment. Such special administrator shall be allowed such compensation for his services as the said court shall deem reasonable, together with reasonable fees for his attorney. [1965 c 145 § 11.32.030. Prior: 1917 c 156 § 83; RRS § 1453; prior: Code 1881 § 1421; 1863 p 222 § 139; 1860 p 185 § 106.]

11.32.040 Succession by personal representative. Upon granting letters testamentary or of administration the power of the special administrator shall cease, and he shall forthwith deliver to the personal representative all the goods, chattels, money, effects, and debts of the deceased in his hands, and the personal representative may be admitted to prosecute any suit commenced by the special administrator, in like manner as an administrator de bonis non is authorized to prosecute a suit commenced by a former personal representative. The estate shall be liable for obligations incurred by the special administrator pursuant to the order of appointment or approved by the court. [1965 c 145 § 11.32.040. Prior: 1917 c 156 § 84; RRS § 1454; prior: Code 1881 § 1422; 1863 p 233 § 140; 1860 p 185 § 107.]

11.32.050 Not liable to creditors. Such special administrator shall not be liable to an action by any creditor of the deceased, and the time for limitation of all suits against the estate shall begin to run from the time of granting letters testamentary or of administration in the usual form, in like manner as if such special administration had not been granted. [1965 c 145 § 11.32.050. Prior: 1917 c 156 § 85; RRS § 1455; prior: Code 1881 § 1423; 1863 p 223 § 141; 1860 p 185 § 108.]

11.32.060 To render account. The special administrator shall also render an account, under oath, of his proceedings, in like manner as other administrators are required to do. [1965 c 145 § 11.32.060. Prior: 1917 c 156 § 86; RRS § 1456; prior: Code 1881 § 1424; 1863 p 223 § 142; 1860 p 185 § 109.]

Settlement of estates: Chapter 11.76 RCW.

Chapter 11.36 RCW
QUALIFICATIONS OF PERSONAL REPRESENTATIVES

Sections

11.36.010 Parties disqualified—Result of disqualification after appointment. The following persons are not qualified to act as personal representatives: Corporations, minors, persons of unsound mind, or persons who have been convicted of any felony or of a misdemeanor involving moral turpitude: PROVIDED, That trust companies regularly organized under the laws of this state and national banks when authorized so to do may act as the personal representative of decedents' or incompetents' estates upon petition of any person having a right to such appointment and may act as executors or guardians when so appointed by will: PROVIDED FURTHER, That professional service corporations regularly organized under the laws of this state whose shareholder or shareholders are exclusively attorneys may act as personal representatives. No trust company or national bank may qualify as such executor or guardian under any will hereafter drawn by it or its agents or employees, and no salaried attorney of any such company may be allowed any attorney fee for probating any such will or in relation to the administration or settlement of any such estate, and no part of any attorney fee may inure, directly or indirectly, to the benefit of any trust company or national bank. When any person to whom letters testamentary or of administration have been issued becomes disqualified to act because of becoming of unsound mind or being convicted of any crime or misdemeanor involving moral turpitude, the court having jurisdiction shall revoke his or her letters. A nonresident may be appointed to act as personal representative if the nonresident appoints an agent who is a resident of the county where such estate is being probated or who is an attorney of record of the estate, upon whom service of all papers may be made; such appointment to be made in writing and filed by the clerk with other papers of such estate; and, unless bond has been waived as provided by RCW 11.28.185, such nonresident personal representative shall file a bond to be approved by the court. [1983 c 51 § 1; 1983 c 3 § 14; 1965 c 145 § 11.36.010. Prior: 1959 c 43 § 1; 1917 c 156 § 87; RRS § 1457; prior: Code 1881 § 1409; 1863 p 227 § 164; 1860 p 189 § 131.]

Rules of court: *Counsel fees: SPR 98.12W.*

Financial institutions may act as guardian: RCW 11.88.020.

Procedure during minority or absence of executor: RCW 11.28.040.

Trust company may act as personal representative: RCW 30.08.150.

11.36.021 Trustees—Who may serve. (1) The following may serve as trustees:

(a) Any suitable persons over the age of eighteen years, if not otherwise disqualified;

(b) Any trust company regularly organized under the laws of this state and national banks when authorized to do so;

(c) Any nonprofit corporation, if the articles of incorporation or bylaws of that corporation permit the action and the

the time and place of hearing thereon. [1965 c 145 § 11.48.025. Prior: 1955 c 98 § 1.]

Request for special notice of proceedings in probate—Prohibitions: RCW 11.28.240.

11.48.030 Chargeable with whole estate. Every personal representative shall be chargeable in his accounts with the whole estate of the deceased which may come into his possession. He shall not be responsible for loss or decrease or destruction of any of the property or effects of the estate, without his fault. [1965 c 145 § 11.48.030. Prior: 1917 c 156 § 155; RRS § 1525; prior: Code 1881 § 1538; 1860 p 210 § 241; 1854 p 295 § 161.]

11.48.040 Not chargeable on special promise to pay decedent's debts unless in writing. No personal representative shall be chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such personal representative, or by some other person by him thereunto specially authorized. [1965 c 145 § 11.48.040. Prior: 1917 c 156 § 154; RRS § 1524; prior: Code 1881 § 1537; 1854 p 295 § 160.]

Agreement to answer damages from own estate must be in writing: RCW 19.36.010.

11.48.050 Allowance of necessary expenses. He shall be allowed all necessary expenses in the care, management and settlement of the estate. [1965 c 145 § 11.48.050. Prior: 1917 c 156 § 156; RRS § 1526; prior: Code 1881 § 1541; 1854 p 295 § 164.]

Rules of court: *SPR 98.12W.*

Attorney's fee to contestant of erroneous account or report: RCW 11.76.070.

Broker's fee and closing expenses—Sale, mortgage or lease: RCW 11.56.265.

Compensation—Attorney's fee: RCW 11.48.210.

Monument, expense of: RCW 11.76.130.

Order of payment of debts: RCW 11.76.110.

Will contests, costs: RCW 11.24.050.

11.48.060 May recover for embezzled or alienated property of decedent. If any person, before the granting of letters testamentary or of administration, shall embezzle or alienate any of the moneys, goods, chattels, or effects of any deceased person, he shall stand chargeable, and be liable to the personal representative of the estate, in the value of the property so embezzled or alienated, together with any damage occasioned thereby, to be recovered for the benefit of the estate. [1965 c 145 § 11.48.060. Prior: 1917 c 156 § 101; RRS § 1471; prior: Code 1881 § 1455; 1854 p 278 § 67.]

Larceny: RCW 9A.56.100.

11.48.070 Concealed or embezzled property—Proceedings for discovery. The court shall have authority to bring before it any person or persons suspected of having in his possession or having concealed, embezzled, conveyed or disposed of any of the property of the estate of decedents or incompetents subject to administration under this title, or who has in his possession or within his knowledge any conveyances, bonds, contracts, or other writings which contain evidence of or may tend to establish the right, title, interest or claim of the deceased in and to any property. If such person be not in the county in which the letters were granted, he may be cited and examined either before the court of the county where found or before the court issuing the order of citation, and if he be found innocent of the charges he shall be entitled to recover costs of the estate, which costs shall be fees and mileage of witnesses, statutory attorney's fees, and such per diem and mileage for the person so charged as allowed to witnesses in civil proceedings. Such party may be brought before the court by means of citation such as the court may choose to issue, and if he refuse to answer such interrogatories as may be put to him touching such matters, the court may commit him to the county jail, there to remain until he shall be willing to make such answers. [1965 c 145 § 11.48.070. Prior: 1917 c 156 § 102; RRS § 1472; prior: 1891 p 385 §§ 22, 23; Code 1881 §§ 1456, 1457; 1854 p 278 §§ 68, 69.]

Guardianship—Concealed or embezzled property—Proceedings for discovery: RCW 11.92.185.

Larceny: RCW 9A.56.100.

11.48.080 Uncollectible debts—Liability—Purchase of claims by personal representative. No personal representative shall be accountable for any debts due the estate, if it shall appear that they remain uncollected without his fault. No personal representative shall purchase any claim against the estate he represents, but the personal representative may make application to the court for permission to purchase certain claims, and if it appears to the court to be for the benefit of the estate that such purchase shall be made, the court may make an order allowing such claims and directing that the same may be purchased by the personal representative under such terms as the court shall order, and such claims shall thereafter be paid as are other claims, but the personal representative shall not profit thereby. [1965 c 145 § 11.48.080. Prior: 1917 c 156 § 157; RRS § 1527; prior: Code 1881 § 1540; 1854 p 295 § 163.]

Request for special notice of proceedings in probate—Prohibitions: RCW 11.28.240.

11.48.090 Actions for recovery of property and on contract. Actions for the recovery of any property or for the possession thereof, and all actions founded upon contracts, may be maintained by and against personal representatives in all cases in which the same might have been maintained by and against their respective testators or intestates. [1965 c 145 § 11.48.090. Prior: 1917 c 156 § 148; RRS § 1518; prior: Code 1881 § 1529; 1860 p 206 § 222; 1854 p 291 § 142.]

Performance of decedent's contracts: Chapter 11.60 RCW.

Survival of actions: Chapter 4.20 RCW.

11.48.120 Action on bond of previous personal representative. Any personal representative may in his own name, for the benefit of all parties interested in the estate, maintain actions on the bond of a former personal representative of the same estate. [1965 c 145 § 11.48.120. Prior: 1917

Application—1997 c 252 §§ 1-73: See note following RCW 11.02.005.

Effective date—Severability—1991 c 193: See RCW 11.114.903 and 11.114.904.

Application, construction—Severability—Effective date—1974 ex.s. c 117: See RCW 11.02.080 and notes following.

11.76.100 Receipts for expenses from personal representative. In rendering his accounts or reports the personal representative shall produce receipts or canceled checks for the expenses and charges which he shall have paid, which receipts shall be filed and remain in court until the probate has been completed and the personal representative has been discharged; however, he may be allowed any item of expenditure, not exceeding twenty dollars, for which no receipt is produced, if such item be supported by his own oath, but such allowances without receipts shall not exceed the sum of three hundred dollars in any one estate. [1987 c 363 § 2; 1965 c 145 § 11.76.100. Prior: 1917 c 156 § 170; RRS § 1540; prior: Code 1881 § 1553; 1854 p 297 § 176.]

11.76.110 Order of payment of debts. After payment of costs of administration the debts of the estate shall be paid in the following order:

(1) Funeral expenses in such amount as the court shall order.

(2) Expenses of the last sickness, in such amount as the court shall order.

(3) Wages due for labor performed within sixty days immediately preceding the death of decedent.

(4) Debts having preference by the laws of the United States.

(5) Taxes, or any debts or dues owing to the state.

(6) Judgments rendered against the deceased in his lifetime which are liens upon real estate on which executions might have been issued at the time of his death, and debts secured by mortgages in the order of their priority.

(7) All other demands against the estate. [1965 c 145 § 11.76.110. Prior: 1917 c 156 § 171; RRS § 1541; prior: Code 1881 § 1562; 1860 p 213 § 264; 1854 p 298 § 184.]

Borrowing on general credit of estate: RCW 11.56.280.

Claims against estate: Chapter 11.40 RCW.

Sale, etc., of property—Priority as to realty or personalty: Chapter 11.10 RCW.

Tax constitutes debt—Priority of lien: RCW 82.32.240.

Wages, preference on death of employer: RCW 49.56.020.

11.76.120 Limitation on preference to mortgage or judgment. The preference given in RCW 11.76.110 to a mortgage or judgment shall only extend to the proceeds of the property subject to the lien of such mortgage or judgment. [1965 c 145 § 11.76.120. Prior: 1917 c 156 § 172; RRS § 1542; prior: 1897 c 22 § 1; Code 1881 § 1653; 1854 p 298 § 185.]

11.76.130 Expense of monument. Personal representatives of the estate of any deceased person are hereby authorized to expend a reasonable amount out of the estate of the decedent to erect a monument or tombstone suitable to mark the grave or crypt of the said decedent, and the expense thereof shall be paid as the funeral expenses are paid. [1965 c 145 § 11.76.130. Prior: 1917 c 156 § 175; RRS § 1545; prior: Code 1881 § 1555; 1875 p 127 § 1.]

11.76.150 Payment of claims where estate insufficient. If the estate shall be insufficient to pay the debts of any class, each creditor shall be paid in proportion to his claim, and no other creditor of any lower class shall receive any payment until all those of the preceding class shall have been fully paid. [1965 c 145 § 11.76.150. Prior: 1917 c 156 § 174; RRS § 1544; prior: Code 1881 § 1564; 1854 p 298 § 186.]

Appropriation to pay debts and expenses: Chapter 11.10 RCW.

Community property: Chapter 26.16 RCW.

Descent and distribution of real and personal estate: RCW 11.04.015.

Priority of sale, etc. as between realty and personalty: Chapter 11.10 RCW.

11.76.160 Liability of personal representative. Whenever a decree shall have been made by the court for the payment of creditors, the personal representative shall be personally liable to each creditor for his claim or the dividend thereon, except when his inability to make the payment thereof from the property of the estate shall result without fault upon his part. The personal representative shall likewise be liable on his bond to each creditor. [1965 c 145 § 11.76.160. Prior: 1917 c 156 § 176; RRS § 1546; prior: 1891 c 155 § 35; Code 1881 § 1568; 1854 p 299 § 190.]

11.76.170 Action on claim not acted on—Contribution. If, after the accounts of the personal representative have been settled and the property distributed, it shall appear that there is a creditor or creditors whose claim or claims have been duly filed and not paid or disallowed, the said claim or claims shall not be a lien upon any of the property distributed, but the said creditor or creditors shall have a cause of action against the personal representative and his bond, for such an amount as such creditor or creditors would have been entitled to receive had the said claim been duly allowed and paid, and shall also have a cause of action against the distributees and creditors for a contribution from them in proportion to the amount which they have received. If the personal representative or his sureties be required to make any payment in this section provided for, he or they shall have a right of action against said distributees and creditors to compel them to contribute their just share. [1965 c 145 § 11.76.170. Prior: 1917 c 156 § 177; RRS § 1547; prior: Code 1881 § 1569; 1860 p 214 § 271; 1854 p 299 § 191.]

11.76.180 Order maturing claim not due. If there be any claim not due the court may in its discretion, after hearing upon such notice as may be determined by it, mature such claim and direct that the same be paid in the due course of the administration. [1965 c 145 § 11.76.180. Prior: 1917 c 156 § 178; RRS § 1548; prior: Code 1881 § 1567; 1854 p 298 § 189.]

11.76.190 Procedure on contingent and disputed claim. If there be any contingent or disputed claim against the estate, the amount thereof, or such part thereof as the holder would be entitled to, if the claim were established or absolute, shall be paid into the court, where it shall remain to be paid over to the party when he shall become entitled

nature of a spendthrift provision or similar restriction. [1989 c 34 § 6.]

11.86.071 Liability for distribution—Effect of disclaimer. No legal representative of a creator of the interest, holder of legal title to property an interest in which is disclaimed, or person having possession of the property shall be liable for any otherwise proper distribution or other disposition made without actual knowledge of the disclaimer, or in reliance upon the disclaimer and without actual knowledge that the disclaimer is barred as provided in RCW 11.86.051. [1989 c 34 § 7.]

11.86.080 Rights under other statutes or rules not abridged. This chapter shall not abridge the right of any person, apart from this chapter, under any existing or future statute or rule of law, to disclaim any interest or to assign, convey, release, renounce or otherwise dispose of any interest. [1973 c 148 § 9.]

11.86.090 Interests existing on June 7, 1973. Any interest which exists on June 7, 1973 but which has not then become indefeasibly vested, or the taker of which has not then become finally ascertained, or of the existence of the transfer of which the beneficiary lacks knowledge, may be disclaimed after June 7, 1973 in the manner provided in RCW 11.86.031. However, for the purposes of RCW 11.86.031(2), the date on which the beneficiary first knows of the existence of the transfer shall be deemed to be the date of the transfer. [1989 c 34 § 8; 1973 c 148 § 10.]

Chapter 11.88 RCW
GUARDIANSHIP—APPOINTMENT, QUALIFICATION, REMOVAL OF GUARDIANS

Sections

Rules of court: Guardians
capacity to sue: CR 17.
judgment for and settlement of claims of minors: SPR 98.16W.
probate proceedings, application for fee, notice: SPR 98.12W.
suit in own name: CR 17.

Allowing child to work without permit, penalty: RCW 26.28.060.

Bank soliciting appointment as guardian, penalty: RCW 30.04.260.

Costs against guardian of infant plaintiff: RCW 4.84.140.

Declaratory judgments: Chapter 7.24 RCW.

Embezzlement by guardian: RCW 9A.56.010(19)(b).

Eminent domain
by corporations, service on guardian of minors, idiots, lunatics or distracted persons: RCW 8.20.020.
by state, service of notice on guardian: RCW 8.04.020.

Excise taxes, liability for, notice to department of revenue: RCW 82.32.240.

*Guardian may sue in own name: **Rules of court:** CR 17.*

Habeas corpus, granting of writ to guardian: RCW 7.36.020.

Incapacitated person, appearance by guardian: RCW 4.08.060.

Industrial insurance benefits, appointment of guardian to manage: RCW 51.04.070.

Investment of trust funds, guardians subject to chapter 30.24 RCW: RCW 11.100.015.

Investments, authorized
generally: Chapter 30.24 RCW.
housing authority bonds: RCW 35.82.220.
United States corporation bonds: RCW 39.60.010.

Jurors, challenge of, guardian and ward relationship ground for implied bias: RCW 4.44.180.

Lawful use of force: RCW 9A.16.020.

Limitation of actions by ward against guardian, recovery of real estate sold by guardian: RCW 4.16.070.

Mental illness, proceedings: Chapter 71.05 RCW.

Minor's personal service contracts, recovery by guardian barred: RCW 26.28.050.

Motor vehicle financial responsibility, release by injured minor executed by guardian: RCW 46.29.120.

Name, action for change of—Fees: RCW 4.24.130.

Partition: Chapter 7.52 RCW.

Public assistance grants, appointment of guardian to receive: RCW 74.08.280, 74.12.250.

Real estate licenses, guardian exemption: RCW 18.85.110.

Savings and loan association, guardian may be member of: RCW 33.20.060.

Seduction, action for seduction of ward: RCW 4.24.020.

State hospital patients, superintendent custodian of estate: RCW 72.23.230.

Support and care of dependent child, liability of guardian, procedure, judgment: RCW 13.34.160, 13.34.161.

Uniform veterans' guardianship act: Chapter 73.36 RCW.

Veterans: RCW 73.04.140.

Volunteer fire fighters' relief, appointment of guardian for fire fighter: RCW 41.24.140.

Washington uniform transfers to minors act: Chapter 11.114 RCW.

Witness, guardian as: RCW 5.60.030.

11.88.005 Legislative intent. It is the intent of the legislature to protect the liberty and autonomy of all people of this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person. The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian. However, their liberty and autonomy should be restricted through the guardianship process only to the minimum extent necessary to adequately provide for their own health or safety, or to ade-

quately manage their financial affairs. [1990 c 122 § 1; 1977 ex.s. c 309 § 1; 1975 1st ex.s. c 95 § 1.]

Effective date—1990 c 122: "This act shall take effect on July 1, 1991." [1990 c 122 § 38.]

Severability—1977 ex.s. c 309: "If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1977 ex.s. c 309 § 18.]

11.88.008 "Professional guardian" defined. As used in this chapter, "professional guardian" means a guardian appointed under this chapter who is not a member of the incapacitated person's family and who charges fees for carrying out the duties of court-appointed guardian of three or more incapacitated persons. [1997 c 312 § 2.]

Effective date—1997 c 312: See note following RCW 11.88.020.

11.88.010 Authority to appoint guardians—Definitions—Venue—Nomination by principal. (1) The superior court of each county shall have power to appoint guardians for the persons and/or estates of incapacitated persons, and guardians for the estates of nonresidents of the state who have property in the county needing care and attention.

(a) For purposes of this chapter, a person may be deemed incapacitated as to person when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.

(b) For purposes of this chapter, a person may be deemed incapacitated as to the person's estate when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.

(c) A determination of incapacity is a legal not a medical decision, based upon a demonstration of management insufficiencies over time in the area of person or estate. Age, eccentricity, poverty, or medical diagnosis alone shall not be sufficient to justify a finding of incapacity.

(d) A person may also be determined incapacitated if he or she is under the age of majority as defined in RCW 26.28.010.

(e) For purposes of giving informed consent for health care pursuant to RCW 7.70.050 and 7.70.065, an "incompetent" person is any person who is (i) incompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his or her property or caring for himself or herself, or both, or (ii) incapacitated as defined in (a), (b), or (d) of this subsection.

(f) For purposes of the terms "incompetent," "disabled," or "not legally competent," as those terms are used in the Revised Code of Washington to apply to persons incapacitated under this chapter, those terms shall be interpreted to mean "incapacitated" persons for purposes of this chapter.

(2) The superior court for each county shall have power to appoint limited guardians for the persons and estates, or either thereof, of incapacitated persons, who by reason of their incapacity have need for protection and assistance, but who are capable of managing some of their personal and financial affairs. After considering all evidence presented as a result of such investigation, the court shall impose, by order, only such specific limitations and restrictions on a incapacitated person to be placed under a limited guardian ship as the court finds necessary for such person's protectio and assistance. A person shall not be presumed to be inc pacitated nor shall a person lose any legal rights or suffer an legal disabilities as the result of being placed under a limite guardianship, except as to those rights and disabilities specif ically set forth in the court order establishing such a limite guardianship. In addition, the court order shall state th period of time for which it shall be applicable.

(3) Venue for petitions for guardianship or limite guardianship shall lie in the county wherein the alleged inca pacitated person is domiciled, or if such person resides in a facility supported in whole or in part by local, state, or federa funding sources, in either the county where the facility is located, the county of domicile prior to residence in the supported facility, or the county where a parent or spouse of the alleged incapacitated person is domiciled.

If the alleged incapacitated person's residency has changed within one year of the filing of the petition, any interested person may move for a change of venue for any proceedings seeking the appointment of a guardian or a limited guardian under this chapter to the county of the alleged incapacitated person's last place of residence of one year or more. The motion shall be granted when it appears to the court that such venue would be in the best interests of the alleged incapacitated person and would promote more complete consideration of all relevant matters.

(4) Under RCW 11.94.010, a principal may nominate, by a durable power of attorney, the guardian or limited guardian of his or her estate or person for consideration by the court if guardianship proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

(5) Imposition of a guardianship for an incapacitated person shall not result in the loss of the right to vote unless the court determines that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice. The court order establishing guardianship shall specify whether or not the individual retains voting rights. When a court determines that the person is incompetent for the purpose of rationally exercising the right to vote, the court shall notify the appropriate county auditor. [2005 c 236 § 3; (2005 c 236 § 2 expired January 1, 2006); 2004 c 267 § 139; 1991 c 289 § 1; 1990 c 122 § 2; 1984 c 149 § 176; 1977 ex.s. c 309 § 2; 1975 1st ex.s. c 95 § 2; 1965 c 145 § 11.88.010. Prior: 1917 c 156 § 195; RRS § 1565; prior: Code 1881 § 1604; 1873 p 314 § 299; 1855 p 15 § 1.]

Effective date—2005 c 236 § 3: "Section 3 of this act takes effect January 1, 2006." [2005 c 236 § 5.]

Expiration date—2005 c 236 § 2: "Section 2 of this act expires January 1, 2006." [2005 c 236 § 4.]

Findings—2005 c 236: "The legislature finds that the right to vote is a fundamental liberty and that this liberty should not be confiscated without due process. When the state chooses to use guardianship proceedings as the basis for the denial of a fundamental liberty, an individual is entitled to basic procedural protections that will ensure fundamental fairness. These basic procedural protections should include clear notice and a meaningful oppor-

tunity to be heard. The legislature further finds that the state has a compelling interest in ensuring that those who cast a ballot understand the nature and effect of voting is an individual decision, and that any restriction of voting rights imposed through guardianship proceedings should be narrowly tailored to meet this compelling interest." [2005 c 236 § 1.]

Effective dates—2004 c 267: See note following RCW 29A.08.651.

Effective date—1990 c 122: See note following RCW 11.88.005.

Severability—Effective dates—1984 c 149: See notes following RCW 11.02.005.

Severability—1977 ex.s. c 309: See note following RCW 11.88.005.

11.88.020 Qualifications. (1) Any suitable person over the age of eighteen years, or any parent under the age of eighteen years or, if the petition is for appointment of a professional guardian, any individual or guardianship service that meets any certification requirements established by the administrator for the courts, may, if not otherwise disqualified, be appointed guardian or limited guardian of the person and/or the estate of an incapacitated person. A financial institution subject to the jurisdiction of the department of financial institutions and authorized to exercise trust powers, and a federally chartered financial institution when authorized to do so, may act as a guardian of the estate of an incapacitated person without having to meet the certification requirements established by the administrator for the courts. No person is qualified to serve as a guardian who is

(a) under eighteen years of age except as otherwise provided herein;

(b) of unsound mind;

(c) convicted of a felony or of a misdemeanor involving moral turpitude;

(d) a nonresident of this state who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate and caused such appointment to be filed with the court;

(e) a corporation not authorized to act as a fiduciary, guardian, or limited guardian in the state;

(f) a person whom the court finds unsuitable.

(2) The professional guardian certification requirements required under this section shall not apply to a testamentary guardian appointed under RCW 11.88.080. [1997 c 312 § 1; 1990 c 122 § 3; 1975 1st ex.s. c 95 § 3; 1971 c 28 § 4; 1965 c 145 § 11.88.020. Prior: 1917 c 156 § 196; RRS § 1566.]

Effective date—1997 c 312: "Sections 1 and 2 of this act take effect January 1, 1999." [1997 c 312 § 4.]

Effective date—1990 c 122: See note following RCW 11.88.005.

Banks and trust companies may act as guardian: RCW 11.36.010.

11.88.030 Petition—Contents—Hearing. (1) Any person or *entity may petition for the appointment of a qualified person, trust company, national bank, or nonprofit corporation authorized in RCW 11.88.020 as the guardian or limited guardian of an incapacitated person. No liability for filing a petition for guardianship or limited guardianship shall attach to a petitioner acting in good faith and upon reasonable basis. A petition for guardianship or limited guardianship shall state:

(a) The name, age, residence, and post office address of the alleged incapacitated person;

(b) The nature of the alleged incapacity in accordance with RCW 11.88.010;

(c) The approximate value and description of property, including any compensation, pension, insurance, or allowance, to which the alleged incapacitated person may be entitled;

(d) Whether there is, in any state, a guardian or limited guardian, or pending guardianship action for the person or estate of the alleged incapacitated person;

(e) The residence and post office address of the person whom petitioner asks to be appointed guardian or limited guardian;

(f) The names and addresses, and nature of the relationship, so far as known or can be reasonably ascertained, of the persons most closely related by blood or marriage to the alleged incapacitated person;

(g) The name and address of the person or facility having the care and custody of the alleged incapacitated person;

(h) The reason why the appointment of a guardian or limited guardian is sought and the interest of the petitioner in the appointment, and whether the appointment is sought as guardian or limited guardian of the person, the estate, or both;

(i) A description of any alternate arrangements previously made by the alleged incapacitated person, such as trusts or powers of attorney, including identifying any guardianship nominations contained in a power of attorney, and why a guardianship is nevertheless necessary;

(j) The nature and degree of the alleged incapacity and the specific areas of protection and assistance requested and the limitation of rights requested to be included in the court's order of appointment;

(k) The requested term of the limited guardianship to be included in the court's order of appointment;

(l) Whether the petitioner is proposing a specific individual to act as guardian ad litem and, if so, the individual's knowledge of or relationship to any of the parties, and why the individual is proposed.

(2)(a) The attorney general may petition for the appointment of a guardian or limited guardian in any case in which there is cause to believe that a guardianship is necessary and no private party is able and willing to petition.

(b) Prepayment of a filing fee shall not be required in any guardianship or limited guardianship brought by the attorney general. Payment of the filing fee shall be ordered from the estate of the incapacitated person at the hearing on the merits of the petition, unless in the judgment of the court, such payment would impose a hardship upon the incapacitated person, in which case the filing shall be waived.

(3) No filing fee shall be charged by the court for filing either a petition for guardianship or a petition for limited guardianship if the petition alleges that the alleged incapacitated person has total assets of a value of less than three thousand dollars.

(4)(a) Notice that a guardianship proceeding has been commenced shall be personally served upon the alleged incapacitated person and the guardian ad litem along with a copy of the petition for appointment of a guardian. Such notice shall be served not more than five court days after the petition has been filed.

(b) Notice under this subsection shall include a clear and easily readable statement of the legal rights of the alleged incapacitated person that could be restricted or transferred to a guardian by a guardianship order as well as the right to

counsel of choice and to a jury trial on the issue of incapacity. Such notice shall be in substantially the following form and shall be in capital letters, double-spaced, and in a type size not smaller than ten-point type:

IMPORTANT NOTICE
PLEASE READ CAREFULLY

A PETITION TO HAVE A GUARDIAN APPOINTED FOR YOU HAS BEEN FILED IN THE ..... COUNTY SUPERIOR COURT BY ..... IF A GUARDIAN IS APPOINTED, YOU COULD LOSE ONE OR MORE OF THE FOLLOWING RIGHTS:

(1) TO MARRY OR DIVORCE;

(2) TO VOTE OR HOLD AN ELECTED OFFICE;

(3) TO ENTER INTO A CONTRACT OR MAKE OR REVOKE A WILL;

(4) TO APPOINT SOMEONE TO ACT ON YOUR BEHALF;

(5) TO SUE AND BE SUED OTHER THAN THROUGH A GUARDIAN;

(6) TO POSSESS A LICENSE TO DRIVE;

(7) TO BUY, SELL, OWN, MORTGAGE, OR LEASE PROPERTY;

(8) TO CONSENT TO OR REFUSE MEDICAL TREATMENT;

(9) TO DECIDE WHO SHALL PROVIDE CARE AND ASSISTANCE;

(10) TO MAKE DECISIONS REGARDING SOCIAL ASPECTS OF YOUR LIFE.

UNDER THE LAW, YOU HAVE CERTAIN RIGHTS.

YOU HAVE THE RIGHT TO BE REPRESENTED BY A LAWYER OF YOUR OWN CHOOSING. THE COURT WILL APPOINT A LAWYER TO REPRESENT YOU IF YOU ARE UNABLE TO PAY OR PAYMENT WOULD RESULT IN A SUBSTANTIAL HARDSHIP TO YOU.

YOU HAVE THE RIGHT TO ASK FOR A JURY TO DECIDE WHETHER OR NOT YOU NEED A GUARDIAN TO HELP YOU.

YOU HAVE THE RIGHT TO BE PRESENT IN COURT AND TESTIFY WHEN THE HEARING IS HELD TO DECIDE WHETHER OR NOT YOU NEED A GUARDIAN. IF A GUARDIAN AD LITEM IS APPOINTED, YOU HAVE THE RIGHT TO REQUEST THE COURT TO REPLACE THAT PERSON.

(5) All petitions filed under the provisions of this section shall be heard within sixty days unless an extension of time is requested by a party or the guardian ad litem within such sixty day period and granted for good cause shown. If an extension is granted, the court shall set a new hearing date. [1996 c 249 § 8; 1995 c 297 § 1; 1991 c 289 § 2; 1990 c 122 § 4; 1977 ex.s. c 309 § 3; 1975 1st ex.s. c 95 § 4; 1965 c 145 § 11.88.030. Prior: 1927 c 170 § 1; 1917 c 156 § 197; RRS § 1567; prior: 1909 c 118 § 1; 1903 c 130 § 1.]

*Reviser's note: Trust companies, national banks, and nonprofit corporations are no longer referred to in RCW 11.88.020, as amended by 1997 c 312 § 1.

Intent—1996 c 249: See note following RCW 2.56.030.

Effective date—1990 c 122: See note following RCW 11.88.005.

Severability—1977 ex.s. c 309: See note following RCW 11.88.005.

11.88.040 Notice and hearing, when required—Service—Procedure. Before appointing a guardian or a limited guardian, notice of a hearing, to be held not less than ten days after service thereof, shall be served personally upon the alleged incapacitated person, if over fourteen years of age, and served upon the guardian ad litem.

Before appointing a guardian or a limited guardian, notice of a hearing, to be held not less than ten days after service thereof, shall be given by registered or certified mail to the last known address requesting a return receipt signed by the addressee or an agent appointed by the addressee, or by personal service in the manner provided for services of summons, to the following:

(1) The alleged incapacitated person, or minor, if under fourteen years of age;

(2) A parent, if the alleged incapacitated person is a minor, all known children not residing with a notified person, and the spouse of the alleged incapacitated person if any;

(3) Any other person who has been appointed as guardian or limited guardian, or the person with whom the alleged incapacitated person resides. No notice need be given to those persons named in subsections (2) and (3) of this section if they have signed the petition for the appointment of the guardian or limited guardian or have waived notice of the hearing.

(4) If the petition is by a parent asking for appointment as guardian or limited guardian of a minor child under the age of fourteen years, or if the petition is accompanied by the written consent of a minor of the age of fourteen years or upward, who consents to the appointment of the guardian or limited guardian asked for, or if the petition is by a nonresident guardian of any minor or incapacitated person, then the court may appoint the guardian without notice of the hearing. The court for good cause may reduce the number of days of notice, but in every case, at least three days notice shall be given.

The alleged incapacitated person shall be present in court at the final hearing on the petition: PROVIDED, That this requirement may be waived at the discretion of the court for good cause other than mere inconvenience shown in the report to be provided by the guardian ad litem pursuant to RCW 11.88.090 as now or hereafter amended, or if no guardian ad litem is required to be appointed pursuant to RCW 11.88.090, as now or hereafter amended, at the discretion of the court for good cause shown by a party. Alternatively, the court may remove itself to the place of residence of the alleged incapacitated person and conduct the final hearing in the presence of the alleged incapacitated person. Final hearings on the petition may be held in closed court without admittance of any person other than those necessary to the action or proceeding.

If presence of the alleged incapacitated person is waived and the court does not remove itself to the place of residence of such person, the guardian ad litem shall appear in person at the final hearing on the petition. [1995 c 297 § 2; 1991 c 289 § 3; 1990 c 122 § 5; 1984 c 149 § 177; 1977 ex.s. c 309 § 2; 1975 1st ex.s. c 95 § 5; 1969 c 70 § 1; 1965 c 145 § 11.88.040. Prior: 1927 c 170 § 2; 1923 c 142 § 4; 1917 c 156 § 198; RRS § 1568; prior: 1909 c 118 § 2; 1903 c 130 §§ 2, 3.]

Effective date—1990 c 122: See note following RCW 11.88.005.

Severability—Effective dates—1984 c 149: See notes following RCW 11.02.005.

Severability—1977 ex.s. c 309: See note following RCW 11.88.005.

11.88.045 Legal counsel and jury trial—Proof—Medical report—Examinations—Waiver. (1)(a) Alleged incapacitated individuals shall have the right to be represented by willing counsel of their choosing at any stage in guardianship proceedings. The court shall provide counsel to represent any alleged incapacitated person at public expense when either: (i) The individual is unable to afford counsel, or (ii) the expense of counsel would result in substantial hardship to the individual, or (iii) the individual does not have practical access to funds with which to pay counsel. If the individual can afford counsel but lacks practical access to funds, the court shall provide counsel and may impose a reimbursement requirement as part of a final order. When, in the opinion of the court, the rights and interests of an alleged or adjudicated incapacitated person cannot otherwise be adequately protected and represented, the court on its own motion shall appoint an attorney at any time to represent such person. Counsel shall be provided as soon as practicable after a petition is filed and long enough before any final hearing to allow adequate time for consultation and preparation. Absent a convincing showing in the record to the contrary, a period of less than three weeks shall be presumed by a reviewing court to be inadequate time for consultation and preparation.

(b) Counsel for an alleged incapacitated individual shall act as an advocate for the client and shall not substitute counsel's own judgment for that of the client on the subject of what may be in the client's best interests. Counsel's role shall be distinct from that of the guardian ad litem, who is expected to promote the best interest of the alleged incapacitated individual, rather than the alleged incapacitated individual's expressed preferences.

(c) If an alleged incapacitated person is represented by counsel and does not communicate with counsel, counsel may ask the court for leave to withdraw for that reason. If satisfied, after affording the alleged incapacitated person an opportunity for a hearing, that the request is justified, the court may grant the request and allow the case to proceed with the alleged incapacitated person unrepresented.

(2) During the pendency of any guardianship, any attorney purporting to represent a person alleged or adjudicated to be incapacitated shall petition to be appointed to represent the incapacitated or alleged incapacitated person. Fees for representation described in this section shall be subject to approval by the court pursuant to the provisions of RCW 11.92.180.

(3) The alleged incapacitated person is further entitled to testify and present evidence and, upon request, entitled to a jury trial on the issues of his or her alleged incapacity. The standard of proof to be applied in a contested case, whether before a jury or the court, shall be that of clear, cogent, and convincing evidence.

(4) In all proceedings for appointment of a guardian or limited guardian, the court must be presented with a written report from a physician licensed to practice under chapter 18.71 or 18.57 RCW, psychologist licensed under chapter 18.83 RCW, or advanced registered nurse practitioner licensed under chapter 18.79 RCW, selected by the guardian ad litem. If the alleged incapacitated person opposes the health care professional selected by the guardian ad litem to prepare the medical report, then the guardian ad litem shall use the health care professional selected by the alleged incapacitated person. The guardian ad litem may also obtain a supplemental examination. The physician, psychologist, or advanced registered nurse practitioner shall have personally examined and interviewed the alleged incapacitated person within thirty days of preparation of the report to the court and shall have expertise in the type of disorder or incapacity the alleged incapacitated person is believed to have. The report shall contain the following information and shall be set forth in substantially the following format:

(a) The name and address of the examining physician, psychologist, or advanced registered nurse practitioner;

(b) The education and experience of the physician, psychologist, or advanced registered nurse practitioner pertinent to the case;

(c) The dates of examinations of the alleged incapacitated person;

(d) A summary of the relevant medical, functional, neurological, or mental health history of the alleged incapacitated person as known to the examining physician, psychologist, or advanced registered nurse practitioner;

(e) The findings of the examining physician, psychologist, or advanced registered nurse practitioner as to the condition of the alleged incapacitated person;

(f) Current medications;

(g) The effect of current medications on the alleged incapacitated person's ability to understand or participate in guardianship proceedings;

(h) Opinions on the specific assistance the alleged incapacitated person needs;

(i) Identification of persons with whom the physician, psychologist, or advanced registered nurse practitioner has met or spoken regarding the alleged incapacitated person.

The court shall not enter an order appointing a guardian or limited guardian until a medical or mental status report meeting the above requirements is filed.

The requirement of filing a medical report is waived if the basis of the guardianship is minority.

(5) During the pendency of an action to establish a guardianship, a petitioner or any person may move for temporary relief under chapter 7.40 RCW, to protect the alleged incapacitated person from abuse, neglect, abandonment, or exploitation, as those terms are defined in RCW 74.34.020, or to address any other emergency needs of the alleged incapacitated person. Any alternative arrangement executed before filing the petition for guardianship shall remain effective unless the court grants the relief requested under chapter 7.40 RCW, or unless, following notice and a hearing at which all parties directly affected by the arrangement are present, the court finds that the alternative arrangement should not remain effective. [2001 c 148 § 1; 1996 c 249 § 9; 1995 c 297 § 3; 1991 c 289 § 4; 1990 c 122 § 6; 1977 ex.s. c 309 § 5; 1975 1st ex.s. c 95 § 7.]

Intent—1996 c 249: See note following RCW 2.56.030.

Effective date—1990 c 122: See note following RCW 11.88.005.

Severability—1977 ex.s. c 309: See note following RCW 11.88.005.

11.88.080 Guardians nominated by will or durable power of attorney. When either parent is deceased, the surviving parent of any minor child or a sole parent of a minor child, may by last will or durable power of attorney nominate a guardian or guardians of the person, or of the estate or both, of a minor child, whether born at the time of executing the instrument or afterwards, to continue during the minority of such child or for any less time. This nomination shall be effective in the event of the death or incapacity of such parent. Every guardian of the estate of a child shall give bond in like manner and with like conditions as required by RCW 11.88.100 and 11.88.110, and he or she shall have the same powers and perform the same duties with regard to the person and estate of the minor as a guardian appointed under this chapter. The court shall confirm the parent's nomination unless the court finds, based upon evidence presented at a hearing on the matter, that the individual nominated in the surviving parent's will or durable power of attorney is not qualified to serve. [2005 c 97 § 11; 1990 c 122 § 7; 1965 c 145 § 11.88.080. Prior: 1917 c 156 § 210; RRS § 1580; prior: Code 1881 § 1618; 1860 p 228 § 335.]

Effective date—1990 c 122: See note following RCW 11.88.005.

11.88.090 Guardian ad litem—Mediation—Appointment—Qualifications—Notice of and statement by guardian ad litem—Hearing and notice—Attorneys' fees and costs—Registry—Duties—Report—Responses—Fee. (1) Nothing contained in RCW 11.88.080 through 11.88.120, 11.92.010 through 11.92.040, 11.92.060 through 11.92.120, 11.92.170, and 11.92.180 shall affect or impair the power of any court to appoint a guardian ad litem to defend the interests of any incapacitated person interested in any suit or matter pending therein, or to commence and prosecute any suit in his or her behalf.

(2) Prior to the appointment of a guardian or a limited guardian, whenever it appears that the incapacitated person or incapacitated person's estate could benefit from mediation and such mediation would likely result in overall reduced costs to the estate, upon the motion of the alleged incapacitated person or the guardian ad litem, or subsequent to such appointment, whenever it appears that the incapacitated person or incapacitated person's estate could benefit from mediation and such mediation would likely result in overall reduced costs to the estate, upon the motion of any interested person, the court may:

(a) Require any party or other person subject to the jurisdiction of the court to participate in mediation;

(b) Establish the terms of the mediation; and

(c) Allocate the cost of the mediation pursuant to *RCW 11.96.140.

(3) Upon receipt of a petition for appointment of guardian or limited guardian, except as provided herein, the court shall appoint a guardian ad litem to represent the best interests of the alleged incapacitated person, who shall be a person found or known by the court to:

(a) Be free of influence from anyone interested in the result of the proceeding; and

(b) Have the requisite knowledge, training, or expertise to perform the duties required by this section.

The guardian ad litem shall within five days of receipt of notice of appointment file with the court and serve, either personally or by certified mail with return receipt, each party with a statement including: His or her training relating to the duties as a guardian ad litem; his or her criminal history as defined in RCW 9.94A.030 for the period covering ten years prior to the appointment; his or her hourly rate, if compensated; whether the guardian ad litem has had any contact with a party to the proceeding prior to his or her appointment; and whether he or she has an apparent conflict of interest. Within three days of the later of the actual service or filing of the guardian ad litem's statement, any party may set a hearing and file and serve a motion for an order to show cause why the guardian ad litem should not be removed for one of the following three reasons: (i) Lack of expertise necessary for the proceeding; (ii) an hourly rate higher than what is reasonable for the particular proceeding; or (iii) a conflict of interest. Notice of the hearing shall be provided to the guardian ad litem and all parties. If, after a hearing, the court enters an order replacing the guardian ad litem, findings shall be included, expressly stating the reasons for the removal. If the guardian ad litem is not removed, the court has the authority to assess to the moving party, attorneys' fees and costs related to the motion. The court shall assess attorneys' fees and costs for frivolous motions.

No guardian ad litem need be appointed when a parent is petitioning for a guardian or a limited guardian to be appointed for his or her minor child and the minority of the child, as defined by RCW 11.92.010, is the sole basis of the petition. The order appointing the guardian ad litem shall recite the duties set forth in subsection (5) of this section. The appointment of a guardian ad litem shall have no effect on the legal competency of the alleged incapacitated person and shall not overcome the presumption of competency or full legal and civil rights of the alleged incapacitated person.

(4)(a) The superior court of each county shall develop and maintain a registry of persons who are willing and qualified to serve as guardians ad litem in guardianship matters. The court shall choose as guardian ad litem a person whose name appears on the registry in a system of consistent rotation, except in extraordinary circumstances such as the need for particular expertise. The court shall develop procedures for periodic review of the persons on the registry and for probation, suspension, or removal of persons on the registry for failure to perform properly their duties as guardian ad litem. In the event the court does not select the person next on the list, it shall include in the order of appointment a written reason for its decision.

(b) To be eligible for the registry a person shall:

(i) Present a written statement outlining his or her background and qualifications. The background statement shall include, but is not limited to, the following information:

(A) Level of formal education;

(B) Training related to the guardian ad litem's duties;

(C) Number of years' experience as a guardian ad litem;

(D) Number of appointments as a guardian ad litem and the county or counties of appointment;

(E) Criminal history, as defined in RCW 9.94A.030; and

(F) Evidence of the person's knowledge, training, and experience in each of the following: Needs of impaired elderly people, physical disabilities, mental illness, developmental disabilities, and other areas relevant to the needs of inca-

pacitated persons, legal procedure, and the requirements of chapters 11.88 and 11.92 RCW.

The written statement of qualifications shall include the names of any counties in which the person was removed from a guardian ad litem registry pursuant to a grievance action, and the name of the court and the cause number of any case in which the court has removed the person for cause; and

(ii) Complete the training as described in (e) of this subsection. The training is not applicable to guardians ad litem appointed pursuant to special proceeding Rule 98.16W.

(c) Superior court shall remove any person from the guardian ad litem registry who misrepresents his or her qualifications pursuant to a grievance procedure established by the court.

(d) The background and qualification information shall be updated annually.

(e) The department of social and health services shall convene an advisory group to develop a model guardian ad litem training program and shall update the program biennially. The advisory group shall consist of representatives from consumer, advocacy, and professional groups knowledgeable in developmental disabilities, neurological impairment, physical disabilities, mental illness, domestic violence, aging, legal, court administration, the Washington state bar association, and other interested parties.

(f) The superior court shall require utilization of the model program developed by the advisory group as described in (e) of this subsection, to assure that candidates applying for registration as a qualified guardian ad litem shall have satisfactorily completed training to attain these essential minimum qualifications to act as guardian ad litem.

(5) The guardian ad litem appointed pursuant to this section shall have the following duties:

(a) To meet and consult with the alleged incapacitated person as soon as practicable following appointment and explain, in language which such person can reasonably be expected to understand, the substance of the petition, the nature of the resultant proceedings, the person's right to contest the petition, the identification of the proposed guardian or limited guardian, the right to a jury trial on the issue of his or her alleged incapacity, the right to independent legal counsel as provided by RCW 11.88.045, and the right to be present in court at the hearing on the petition;

(b) To obtain a written report according to RCW 11.88.045; and such other written or oral reports from other qualified professionals as are necessary to permit the guardian ad litem to complete the report required by this section;

(c) To meet with the person whose appointment is sought as guardian or limited guardian and ascertain:

(i) The proposed guardian's knowledge of the duties, requirements, and limitations of a guardian; and

(ii) The steps the proposed guardian intends to take or has taken to identify and meet the needs of the alleged incapacitated person;

(d) To consult as necessary to complete the investigation and report required by this section with those known relatives, friends, or other persons the guardian ad litem determines have had a significant, continuing interest in the welfare of the alleged incapacitated person;

(e) To investigate alternate arrangements made, or which might be created, by or on behalf of the alleged incapacitated person, such as revocable or irrevocable trusts, durable powers of attorney, or blocked accounts; whether good cause exists for any such arrangements to be discontinued; and why such arrangements should not be continued or created in lieu of a guardianship;

(f) To provide the court with a written report which shall include the following:

(i) A description of the nature, cause, and degree of incapacity, and the basis upon which this judgment was made;

(ii) A description of the needs of the incapacitated person for care and treatment, the probable residential requirements of the alleged incapacitated person and the basis upon which these findings were made;

(iii) An evaluation of the appropriateness of the guardian or limited guardian whose appointment is sought and a description of the steps the proposed guardian has taken or intends to take to identify and meet current and emerging needs of the incapacitated person;

(iv) A description of any alternative arrangements previously made by the alleged incapacitated person or which could be made, and whether and to what extent such alternatives should be used in lieu of a guardianship, and if the guardian ad litem is recommending discontinuation of any such arrangements, specific findings as to why such arrangements are contrary to the best interest of the alleged incapacitated person;

(v) A description of the abilities of the alleged incapacitated person and a recommendation as to whether a guardian or limited guardian should be appointed. If appointment of a limited guardian is recommended, the guardian ad litem shall recommend the specific areas of authority the limited guardian should have and the limitations and disabilities to be placed on the incapacitated person;

(vi) An evaluation of the person's mental ability to rationally exercise the right to vote and the basis upon which the evaluation is made;

(vii) Any expression of approval or disapproval made by the alleged incapacitated person concerning the proposed guardian or limited guardian or guardianship or limited guardianship;

(viii) Identification of persons with significant interest in the welfare of the alleged incapacitated person who should be advised of their right to request special notice of proceedings pursuant to RCW 11.92.150; and

(ix) Unless independent counsel has appeared for the alleged incapacitated person, an explanation of how the alleged incapacitated person responded to the advice of the right to jury trial, to independent counsel and to be present at the hearing on the petition.

Within forty-five days after notice of commencement of the guardianship proceeding has been served upon the guardian ad litem, and at least fifteen days before the hearing on the petition, unless an extension or reduction of time has been granted by the court for good cause, the guardian ad litem shall file its report and send a copy to the alleged incapacitated person and his or her counsel, spouse, all children not residing with a notified person, those persons described in (f)(viii) of this subsection, and persons who have filed a request for special notice pursuant to RCW 11.92.150. If the guardian ad litem needs additional time to finalize his or her report, then the guardian ad litem shall petition the court for a

postponement of the hearing or, with the consent of all other parties, an extension or reduction of time for filing the report. If the hearing does not occur within sixty days of filing the petition, then upon the two-month anniversary of filing the petition and on or before the same day of each following month until the hearing, the guardian ad litem shall file interim reports summarizing his or her activities on the proceeding during that time period as well as fees and costs incurred;

(g) To advise the court of the need for appointment of counsel for the alleged incapacitated person within five court days after the meeting described in (a) of this subsection unless (i) counsel has appeared, (ii) the alleged incapacitated person affirmatively communicated a wish not to be represented by counsel after being advised of the right to representation and of the conditions under which court-provided counsel may be available, or (iii) the alleged incapacitated person was unable to communicate at all on the subject, and the guardian ad litem is satisfied that the alleged incapacitated person does not affirmatively desire to be represented by counsel.

(6) If the petition is brought by an interested person or entity requesting the appointment of some other qualified person or entity and a prospective guardian or limited guardian cannot be found, the court shall order the guardian ad litem to investigate the availability of a possible guardian or limited guardian and to include the findings in a report to the court pursuant to subsection (5)(f) of this section.

(7) The parties to the proceeding may file responses to the guardian ad litem report with the court and deliver such responses to the other parties and the guardian ad litem at any time up to the second day prior to the hearing. If a guardian ad litem fails to file his or her report in a timely manner, the hearing shall be continued to give the court and the parties at least fifteen days before the hearing to review the report. At any time during the proceeding upon motion of any party or on the court's own motion, the court may remove the guardian ad litem for failure to perform his or her duties as specified in this chapter, provided that the guardian ad litem shall have five days' notice of any motion to remove before the court enters such order. In addition, the court in its discretion may reduce a guardian ad litem's fee for failure to carry out his or her duties.

(8) The court appointed guardian ad litem shall have the authority, in the event that the alleged incapacitated person is in need of emergency life-saving medical services, and is unable to consent to such medical services due to incapacity pending the hearing on the petition to give consent for such emergency life-saving medical services on behalf of the alleged incapacitated person.

(9) The court-appointed guardian ad litem shall have the authority to move for temporary relief under chapter 7.40 RCW to protect the alleged incapacitated person from abuse, neglect, abandonment, or exploitation, as those terms are defined in RCW 74.34.020, or to address any other emergency needs of the alleged incapacitated person. Any alternative arrangement executed before filing the petition for guardianship shall remain effective unless the court grants the relief requested under chapter 7.40 RCW, or unless, following notice and a hearing at which all parties directly affected by the arrangement are present, the court finds that the alternative arrangement should not remain effective.

(10) The guardian ad litem shall receive a fee determined by the court. The fee shall be charged to the alleged incapacitated person unless the court finds that such payment would result in substantial hardship upon such person, in which case the county shall be responsible for such costs: PROVIDED, That the court may charge such fee to the petitioner, the alleged incapacitated person, or any person who has appeared in the action; or may allocate the fee, as it deems just. If the petition is found to be frivolous or not brought in good faith, the guardian ad litem fee shall be charged to the petitioner. The court shall not be required to provide for the payment of a fee to any salaried employee of a public agency.

(11) Upon the presentation of the guardian ad litem report and the entry of an order either dismissing the petition for appointment of guardian or limited guardian or appointing a guardian or limited guardian, the guardian ad litem shall be dismissed and shall have no further duties or obligations unless otherwise ordered by the court. If the court orders the guardian ad litem to perform further duties or obligations, they shall not be performed at county expense.

(12) The guardian ad litem shall appear in person at all hearings on the petition unless all parties provide a written waiver of the requirement to appear.

(13) At any hearing the court may consider whether any person who makes decisions regarding the alleged incapacitated person or estate has breached a statutory or fiduciary duty. [2000 c 124 § 1; 1999 c 360 § 1; 1996 c 249 § 10; 1995 c 297 § 4; 1991 c 289 § 5; 1990 c 122 § 8; 1977 ex.s. c 309 § 6; 1975 1st ex.s. c 95 § 9; 1965 c 145 § 11.88.090. Prior: 1917 c 156 § 211; RRS § 1581; prior: Code 1881 § 1619; 1873 p 318 § 314; 1860 p 228 § 336.]

Rules of court: *Judgment for and settlement of claims of minors: SPR 98.16W.*

***Reviser's note:** RCW 11.96.140 was repealed by 1999 c 42 § 637, effective January 1, 2000.

Grievance rules—2000 c 124: "Each superior court shall adopt rules establishing and governing procedures for filing, investigating, and adjudicating grievances made by or against guardians ad litem under Titles 11, 13, and 26 RCW." [2000 c 124 § 16.]

Intent—1996 c 249: See note following RCW 2.56.030.

Effective date—1990 c 122: See note following RCW 11.88.005.

Severability—1977 ex.s. c 309: See note following RCW 11.88.005.

Costs against guardian of infant plaintiff: RCW 4.84.140.

District judge, guardian ad litem if defendant minor, appointment of: RCW 12.04.150.

Execution against for costs against infant plaintiff: RCW 4.84.140.

Incapacitated persons
appearance in civil action: RCW 4.08.060.
appointment for civil actions: RCW 4.08.060.

Liability for costs against infant plaintiffs: RCW 4.84.140.

Minors, for
appearance in civil actions: RCW 4.08.050.
appointment for civil actions: RCW 4.08.050.
district court proceedings: RCW 12.04.150.

Registration of land titles, appointment for minors: RCW 65.12.145.

11.88.093 Ex parte communications—Removal. A guardian ad litem shall not engage in ex parte communications with any judicial officer involved in the matter for which he or she is appointed during the pendency of the pro-

ceeding, except as permitted by court rule or statute for ex parte motions. Ex parte motions shall be heard in open court on the record. The record may be preserved in a manner deemed appropriate by the county where the matter is heard. The court, upon its own motion, or upon the motion of a party, may consider the removal of any guardian ad litem who violates this section from any pending case or from any court-authorized registry, and if so removed may require forfeiture of any fees for professional services on the pending case. [2000 c 124 § 10.]

11.88.095 Disposition of guardianship petition. (1) In determining the disposition of a petition for guardianship, the court's order shall be based upon findings as to the capacities, condition, and needs of the alleged incapacitated person, and shall not be based solely upon agreements made by the parties.

(2) Every order appointing a full or limited guardian of the person or estate shall include:

(a) Findings as to the capacities, condition, and needs of the alleged incapacitated person;

(b) The amount of the bond, if any, or a bond review period;

(c) When the next report of the guardian is due;

(d) Whether the guardian ad litem shall continue acting as guardian ad litem;

(e) Whether a review hearing shall be required upon the filing of the inventory;

(f) The authority of the guardian, if any, for investment and expenditure of the ward's estate; and

(g) Names and addresses of those persons described in RCW 11.88.090(5)(d), if any, whom the court believes should receive copies of further pleadings filed by the guardian with respect to the guardianship.

(3) If the court determines that a limited guardian should be appointed, the order shall specifically set forth the limits by either stating exceptions to the otherwise full authority of the guardian or by stating the specific authority of the guardian.

(4) In determining the disposition of a petition for appointment of a guardian or limited guardian of the estate only, the court shall consider whether the alleged incapacitated person is capable of giving informed medical consent or of making other personal decisions and, if not, whether a guardian or limited guardian of the person of the alleged incapacitated person should be appointed for that purpose.

(5) Unless otherwise ordered, any powers of attorney or durable powers of attorney shall be revoked upon appointment of a guardian or limited guardian of the estate.

If there is an existing medical power of attorney, the court must make a specific finding of fact regarding the continued validity of that medical power of attorney before appointing a guardian or limited guardian for the person. [1995 c 297 § 5; 1991 c 289 § 6; 1990 c 122 § 9.]

Effective date—1990 c 122: See note following RCW 11.88.005.

11.88.097 Guardian ad litem—Fees. The court shall specify the hourly rate the guardian ad litem may charge for his or her services, and shall specify the maximum amount the guardian ad litem may charge without additional court review and approval. The court shall specify rates and fees in the order of appointment or at the earliest date the court is able to determine the appropriate rates and fees and prior to the guardian ad litem billing for his or her services. This section shall apply except as provided by local court rule. [2000 c 124 § 13.]

11.88.100 Oath and bond of guardian or limited guardian. Before letters of guardianship are issued, each guardian or limited guardian shall take and subscribe an oath and, unless dispensed with by order of the court as provided in RCW 11.88.105, file a bond, with sureties to be approved by the court, payable to the state, in such sum as the court may fix, taking into account the character of the assets on hand or anticipated and the income to be received and disbursements to be made, and such bond shall be conditioned substantially as follows:

The condition of this obligation is such, that if the above bound A.B., who has been appointed guardian or limited guardian for C.D., shall faithfully discharge the office and trust of such guardian or limited guardian according to law and shall render a fair and just account of his guardianship or limited guardianship to the superior court of the county of ....., from time to time as he shall thereto be required by such court, and comply with all orders of the court, lawfully made, relative to the goods, chattels, moneys, care, management, and education of such incapacitated person, or his or her property, and render and pay to such incapacitated person all moneys, goods, chattels, title papers, and effects which may come into the hands or possession of such guardian or limited guardian, at such time and in such manner as the court may order, then this obligation shall be void, otherwise it shall remain in effect.

The bond shall be for the use of the incapacitated person, and shall not become void upon the first recovery, but may be put in suit from time to time against all or any one of the obligors, in the name and for the use and benefit of any person entitled by the breach thereof, until the whole penalty is recovered thereon. The court may require an additional bond whenever for any reason it appears to the court that an additional bond should be given.

In all guardianships or limited guardianships of the person, and in all guardianship or limited guardianships of the estate, in which the petition alleges that the alleged incapacitated person has total assets of a value of less than three thousand dollars, the court may dispense with the requirement of a bond pending filing of an inventory confirming that the estate has total assets of less than three thousand dollars: PROVIDED, That the guardian or limited guardian shall swear to report to the court any changes in the total assets of the incapacitated person increasing their value to over three thousand dollars: PROVIDED FURTHER, That the guardian or limited guardian shall file a yearly statement showing the monthly income of the incapacitated person if said monthly income, excluding moneys from state or federal benefits, is over the sum of five hundred dollars per month for any three consecutive months. [1990 c 122 § 10; 1983 c 271 § 1; 1977 ex.s. c 309 § 7; 1975 1st ex.s. c 95 § 10; 1965 c 145 § 11.88.100. Prior: 1961 c 155 § 1; 1951 c 242 § 1; 1947 c 145 § 1; 1945 c 41 § 1; 1917 c 156 § 203; Rem. Supp. 1947 §

1573; prior: 1905 c 17 § 1; Code 1881 § 1612; 1860 p 226 § 329.]

Effective date—1990 c 122: See note following RCW 11.88.005.

Severability—1977 ex.s. c 309: See note following RCW 11.88.005.

Citation of surety on bond: RCW 11.92.056.

Suretyship: Chapter 19.72 RCW.

11.88.105 Reduction in amount of bond. In cases where all or a portion of the estate consisting of cash or securities has been placed in possession of savings and loan associations or banks, trust companies, escrow corporations, or other corporations approved by the court and if a verified receipt signed by the custodian of the funds is filed by the guardian or limited guardian in court stating that such corporations hold the cash or securities subject to order of court, the court may in its discretion dispense with the bond or reduce the amount of the bond by the amount of such deposits. [1990 c 122 § 11; 1975 1st ex.s. c 95 § 11; 1965 c 145 § 11.88.105.]

Effective date—1990 c 122: See note following RCW 11.88.005.

11.88.107 When bond not required. In all cases where a bank or trust company, authorized to act as guardian or limited guardian, or where a nonprofit corporation is authorized under its articles of incorporation to act as guardian or limited guardian, is appointed as guardian or limited guardian, or acts as guardian or limited guardian under an appointment as such heretofore made, no bond shall be required: PROVIDED, That in the case of appointment of a nonprofit corporation court approval shall be required before any bond requirement of this chapter may be waived. [1990 c 122 § 12; 1977 ex.s. c 309 § 8; 1975 1st ex.s. c 95 § 12; 1965 c 145 § 11.88.107.]

Effective date—1990 c 122: See note following RCW 11.88.005.

Severability—1977 ex.s. c 309: See note following RCW 11.88.005.

11.88.110 Law on executors' and administrators' bonds applicable. All the provisions of this title relative to bonds given by executors and administrators shall apply to bonds given by guardians or limited guardians. [1975 1st ex.s. c 95 § 13; 1965 c 145 § 11.88.110. Prior: 1917 c 156 § 204; RRS § 1574; prior: Code 1881 § 1617; 1860 p 228 § 334.]

11.88.115 Notice to department of revenue. Duty of guardian to notify department of revenue; personal liability for taxes upon failure to give notice: See RCW 82.32.240.

11.88.120 Modification or termination of guardianship—Procedure. (1) At any time after establishment of a guardianship or appointment of a guardian, the court may, upon the death of the guardian or limited guardian, or, for other good reason, modify or terminate the guardianship or replace the guardian or limited guardian.

(2) Any person, including an incapacitated person, may apply to the court for an order to modify or terminate a guardianship or to replace a guardian or limited guardian. If applicants are represented by counsel, counsel shall move for an order to show cause why the relief requested should not be granted. If applicants are not represented by counsel, they may move for an order to show cause, or they may deliver a written request to the clerk of the court.

(3) By the next judicial day after receipt of an unrepresented person's request to modify or terminate a guardianship order, or to replace a guardian or limited guardian, the clerk shall deliver the request to the court. The court may (a) direct the clerk to schedule a hearing, (b) appoint a guardian ad litem to investigate the issues raised by the application or to take any emergency action the court deems necessary to protect the incapacitated person until a hearing can be held, or (c) deny the application without scheduling a hearing, if it appears based on documents in the court file that the application is frivolous. Any denial of an application without a hearing shall be in writing with the reasons for the denial explained. A copy of the order shall be mailed by the clerk to the applicant, to the guardian, and to any other person entitled to receive notice of proceedings in the matter. Unless within thirty days after receiving the request from the clerk the court directs otherwise, the clerk shall schedule a hearing on the request and mail notice to the guardian, the incapacitated person, the applicant, all counsel of record, and any other person entitled to receive notice of proceedings in the matter.

(4) In a hearing on an application to modify or terminate a guardianship, or to replace a guardian or limited guardian, the court may grant such relief as it deems just and in the best interest of the incapacitated person.

(5) The court may order persons who have been removed as guardians to deliver any property or records belonging to the incapacitated person in accordance with the court's order. Similarly, when guardians have died or been removed and property or records of an incapacitated person are being held by any other person, the court may order that person to deliver it in accordance with the court's order. Disobedience of an order to deliver shall be punishable as contempt of court. [1991 c 289 § 7; 1990 c 122 § 14; 1977 ex.s. c 309 § 9; 1975 1st ex.s. c 95 § 14; 1965 c 145 § 11.88.120. Prior: 1917 c 156 § 209; RRS § 1579; prior: Code 1881 § 1616; 1860 p 227 § 333; 1855 p 17 § 11.]

Effective date—1990 c 122: See note following RCW 11.88.005.

Severability—1977 ex.s. c 309: See note following RCW 11.88.005.

11.88.125 Standby limited guardian or limited guardian. (1) The person appointed by the court as either guardian or limited guardian of the person and/or estate of an incapacitated person, shall file in writing with the court, a notice designating a standby limited guardian or guardian to serve as limited guardian or guardian at the death or legal incapacity of the court-appointed guardian or limited guardian. The notice shall state the name, address, zip code, and telephone number of the designated standby or limited guardian. Notice of the guardian's designation of the standby guardian shall be given to the standby guardian, the incapacitated person and his or her spouse and adult children, any facility in which the incapacitated person resides, and any person entitled to special notice under RCW 11.92.150 or any person entitled to receive pleadings pursuant to RCW 11.88.095(2)(g). Such standby guardian or limited guardian shall have all the powers, duties, and obligations of the regularly appointed guardian or limited guardian and in addition shall, within a period of thirty days from the death or adjudi-

cation of incapacity of the regularly appointed guardian or limited guardian, file with the superior court in the county in which the guardianship or limited guardianship is then being administered, a petition for appointment of a substitute guardian or limited guardian. Upon the court's appointment of a new, substitute guardian or limited guardian, the standby guardian or limited guardian shall make an accounting and report to be approved by the court, and upon approval of the court, the standby guardian or limited guardian shall be released from all duties and obligations arising from or out of the guardianship or limited guardianship.

(2) Letters of guardianship shall be issued to the standby guardian or limited guardian upon filing an oath and posting a bond as required by RCW 11.88.100 as now or hereafter amended. The oath may be filed prior to the appointed guardian or limited guardian's death. Notice of such appointment shall be provided to the standby guardian, the incapacitated person, and any facility in which the incapacitated person resides. The provisions of RCW 11.88.100 through 11.88.110 as now or hereafter amended shall apply to standby guardians and limited guardians.

(3) In addition to the powers of a standby limited guardian or guardian as noted in subsection (1) of this section, the standby limited guardian or guardian shall have the authority to provide timely, informed consent to necessary medical procedures, as authorized in RCW 11.92.040 as now or hereafter amended, if the guardian or limited guardian cannot be located within four hours after the need for such consent arises. [1991 c 289 § 8; 1990 c 122 § 15; 1979 c 32 § 1; 1977 ex.s. c 309 § 10; 1975 1st ex.s. c 95 § 6.]

Effective date—1990 c 122: See note following RCW 11.88.005.

Severability—1977 ex.s. c 309: See note following RCW 11.88.005.

11.88.130 Transfer of jurisdiction and venue. The court of any county having jurisdiction of any guardianship or limited guardianship proceeding is authorized to transfer jurisdiction and venue of the guardianship or limited guardianship proceeding to the court of any other county of the state upon application of the guardian, limited guardian, or incapacitated person and such notice to an alleged incapacitated person or other interested party as the court may require. Such transfers of guardianship or limited guardianship proceedings shall be made to the court of a county wherein either the guardian or limited guardian or alleged incapacitated person resides, as the court may deem appropriate, at the time of making application for such transfer. The original order providing for any such transfer shall be retained as a permanent record by the clerk of the court in which such order is entered, and a certified copy thereof together with the original file in such guardianship or limited guardianship proceeding and a certified transcript of all record entries up to and including the order for such change shall be transmitted to the clerk of the court to which such proceeding is transferred. [1990 c 122 § 16; 1975 1st ex.s. c 95 § 15; 1965 c 145 § 11.88.130. Prior: 1955 c 45 § 1.]

Effective date—1990 c 122: See note following RCW 11.88.005.

11.88.140 Termination of guardianship or limited guardianship. (1) TERMINATION WITHOUT COURT ORDER. A guardianship or limited guardianship is terminated:

(a) Upon the attainment of full and legal age, as defined in RCW 26.28.010 as now or hereafter amended, of any person defined as an incapacitated person pursuant to RCW 11.88.010 as now or hereafter amended solely by reason of youth, RCW 26.28.020 to the contrary notwithstanding, subject to subsection (2) of this section;

(b) By an adjudication of capacity or an adjudication of termination of incapacity;

(c) By the death of the incapacitated person;

(d) By expiration of the term of limited guardianship specified in the order appointing the limited guardian, unless prior to such expiration a petition has been filed and served, as provided in RCW 11.88.040 as now or hereafter amended, seeking an extension of such term.

(2) TERMINATION OF GUARDIANSHIP FOR A MINOR BY DECLARATION OF COMPLETION. A guardianship for the benefit of a minor may be terminated upon the minor's attainment of legal age, as defined in RCW 26.28.010 as now or hereafter amended, by the guardian filing a declaration that states:

(a) The date the minor attained legal age;

(b) That the guardian has paid all of the minor's funds in the guardian's possession to the minor, who has signed a receipt for the funds, and that the receipt has been filed with the court;

(c) That the guardian has completed the administration of the minor's estate and the guardianship is ready to be closed; and

(d) The amount of fees paid or to be paid to each of the following: (i) The guardian, (ii) lawyer or lawyers, (iii) accountant or accountants; and that the guardian believes the fees are reasonable and does not intend to obtain court approval of the amount of the fees or to submit a guardianship accounting to the court for approval. Subject to the requirement of notice as provided in this section, unless the minor petitions the court either for an order requiring the guardian to obtain court approval of the amount of fees paid or to be paid to the guardian, lawyers, or accountants, or for an order requiring an accounting, or both, within thirty days from the filing of the declaration of completion of guardianship, the guardian shall be automatically discharged without further order of the court. The guardian's powers will cease thirty days after filing the declaration of completion of guardianship. The declaration of completion of guardianship shall, at the time, be the equivalent of an entry of a decree terminating the guardianship, distributing the assets, and discharging the guardian for all legal intents and purposes.

Within five days of the date of filing the declaration of completion of guardianship, the guardian or the guardian's lawyer shall mail a copy of the declaration of completion to the minor together with a notice that shall be substantially as follows:

CAPTION OF CASE	NOTICE OF FILING A DECLARATION OF COMPLETION OF GUARDIANSHIP

NOTICE IS GIVEN that the attached Declaration of Completion of Guardianship was filed by the undersigned in the above-entitled court on the ..... day of ....., 19 . . .; unless you file a petition in the above-entitled court requesting the court to review the reasonableness of the fees, or for an accounting, or both, and serve a copy of the petition on the guardian or the guardian's lawyer, within thirty days after the filing date, the amount of fees paid or to be paid will be deemed reasonable, the acts of the guardian will be deemed approved, the guardian will be automatically discharged without further order of the court and the Declaration of Completion of Guardianship will be final and deemed the equivalent of an order terminating the guardianship, discharging the guardian and decreeing the distribution of the guardianship assets.

If you file and serve a petition within the period specified, the undersigned will request the court to fix a time and place for the hearing of your petition, and you will be notified of the time and place of the hearing, by mail, or by personal service, not less than ten days before the hearing on the petition.

DATED this ..... day of ....., 19 . . .

.....
Guardian

If the minor, after reaching legal age, waives in writing the notice required by this section, the guardian will be automatically discharged without further order of the court and the declaration of completion of guardianship will be effective as an order terminating the guardianship without an accounting upon filing the declaration. If the guardian has been required to furnish a bond, and a declaration of completion of guardianship is filed according to this section, any bond furnished by the guardian shall be automatically discharged upon the discharge of the guardian.

(3) TERMINATION ON COURT ORDER. A guardianship or limited guardianship may be terminated by court order after such notice as the court may require if the guardianship or limited guardianship is no longer necessary.

The guardian or limited guardian shall, within thirty days of the date of termination, unless the court orders a different deadline for good cause, prepare and file with the court a final verified account of administration. The final verified account of administration shall contain the same information as required for (a) an intermediate verified account of administration of the estate under RCW 11.92.040(2) and (b) an intermediate personal care status report under RCW 11.92.043(2).

(4) EFFECT OF TERMINATION. When a guardianship or limited guardianship terminates other than by the death of the incapacitated person, the powers of the guardian or limited guardian cease, except that a guardian or limited guardian of the estate may make disbursements for claims that are or may be allowed by the court, for liabilities already properly incurred for the estate or for the incapacitated person, and for expenses of administration. When a guardianship or limited guardianship terminates by death of the incapacitated person, the guardian or limited guardian of the estate may proceed under RCW 11.88.150 as now or hereafter amended, but the rights of all creditors against the incapacitated person's estate shall be determined by the law of decedents' estates. [1991 c 289 § 9; 1990 c 122 § 17; 1977 ex.s. c 309 § 11; 1975 1st ex.s. c 95 § 16; 1965 c 145 § 11.88.140.]

Effective date—1990 c 122: See note following RCW 11.88.005.

Severability—1977 ex.s. c 309: See note following RCW 11.88.005.

Procedure on removal or death of guardian or limited guardian: RCW 11.88.120.

Settlement of estate upon termination: RCW 11.92.053.

11.88.150 Administration of deceased incapacitated person's estate. (1) Upon the death of an incapacitated person, a guardian or limited guardian of the estate shall have authority to disburse or commit those funds under the control of the guardian or limited guardian as are prudent and within the means of the estate for the disposition of the deceased incapacitated person's remains. Consent for such arrangement shall be secured according to RCW 68.50.160. If no person authorized by *RCW 68.50.150 accepts responsibility for giving consent, the guardian or limited guardian of the estate may consent, subject to the provisions of this section and to the known directives of the deceased incapacitated person. Reasonable financial commitments made by a guardian or limited guardian pursuant to this section shall be binding against the estate of the deceased incapacitated person.

(2) Upon the death of an incapacitated person intestate the guardian or limited guardian of his estate has power under the letters issued to him and subject to the direction of the court to administer the estate as the estate of the deceased incapacitated person without further letters unless within forty days after death of the incapacitated person a petition is filed for letters of administration or for letters testamentary and the petition is granted. If the guardian or limited guardian elects to administer the estate under his letters of guardianship or limited guardianship, he shall petition the court for an order transferring the guardianship or limited guardianship proceeding to a probate proceeding, and upon court approval, the clerk of the court shall re-index the cause as a decedent's estate, using the same file number which was assigned to the guardianship or limited guardianship proceeding. The guardian or limited guardian shall then be authorized to continue administration of the estate without the necessity for any further petition or hearing. Notice to creditors and other persons interested in the estate shall be published and may be combined with the notice of the guardian's or limited guardian's final account. This notice shall be given and published in the manner provided in chapter 11.40 RCW. Upon the hearing, the account may be allowed and the balance distributed to the persons entitled thereto, after the payment of such claims as may be allowed. Liability on the guardian's or limited guardian's bond shall continue until exonerated on settlement of his account, and may apply to the complete administration of the estate of the deceased incapacitated person with the consent of the surety. If letters of administration are granted upon petition filed within forty days after the death of the incapacitated person, the personal representative shall supersede the guardian or limited guardian in the administration of the estate and the estate shall be administered as a decedent's estate as provided in this title, including the publication of notice to creditors and other interested persons and the barring of creditors claims. [1990 c 122 § 18; 1977 ex.s. c 309 § 12; 1975 1st ex.s. c 95 § 17; 1965 c 145 § 11.88.150.]

*Reviser's note: The reference to RCW 68.50.150 appears to be erroneous. RCW 68.50.160 was apparently intended. RCW 68.50.150 was subsequently repealed by 2005 c 365 § 161.

Effective date—1990 c 122: See note following RCW 11.88.005.

Severability—1977 ex.s. c 309: See note following RCW 11.88.005.

Settlement of estate upon termination: RCW 11.92.053.

11.88.160 Guardianships involving veterans. For guardianships involving veterans see chapter 73.36 RCW. [1990 c 122 § 13.]

Effective date—1990 c 122: See note following RCW 11.88.005.

Chapter 11.92 RCW
GUARDIANSHIP—POWERS AND DUTIES OF GUARDIAN OR LIMITED GUARDIAN

Sections

Veterans: RCW 73.04.140.

11.92.010 Guardians or limited guardians under court control—Legal age. Guardians or limited guardians herein provided for shall at all times be under the general direction and control of the court making the appointment. For the purposes of chapters 11.88 and 11.92 RCW, all persons shall be of full and legal age when they shall be eighteen years old. [1975 1st ex.s. c 95 § 18; 1971 c 28 § 5; 1965 c 145 § 11.92.010. Prior: 1923 c 72 § 1; 1917 c 156 § 202; RRS § 1572. Formerly RCW 11.92.010 and 11.92.020.]

Age of majority: RCW 26.28.010.

Married persons deemed to be of full age: RCW 26.28.020.

Termination of guardianship or limited guardianship upon attainment of legal age: RCW 11.88.140.

Transfer of jurisdiction and venue: RCW 11.88.130.

11.92.035 Claims. (1) DUTY OF GUARDIAN TO PAY. A guardian of the estate is under a duty to pay from the estate all just claims against the estate of the incapacitated person, whether they constitute liabilities of the incapacitated person which arose prior to the guardianship or liabilities properly incurred by the guardian for the benefit of the incapacitated person or his or her estate and whether arising in contract or in tort or otherwise, upon allowance of the claim by the court or upon approval of the court in a settlement of the guardian's accounts. The duty of the guardian to pay from the estate shall not preclude the guardian's personal liability for his or her own contracts and acts made and performed on behalf of the estate as it exists according to the common law. If it appears that the estate is likely to be exhausted before all existing claims are paid, preference shall be given to (a) the expenses of administration including guardian's fees, attorneys' fees, and court costs; (b) prior claims for the care, maintenance and education of the incapacitated person and of the person's dependents over other claims. Subject to court orders limiting such powers, a limited guardian of an estate shall have the same authority to pay claims.

(2) CLAIMS MAY BE PRESENTED. Any person having a claim against the estate of an incapacitated person, or against the guardian of his or her estate as such, may file a written claim with the court for determination at any time before it is barred by the statute of limitations. After ten days' notice to a guardian or limited guardian, a hearing on the claim shall be held, at which upon proof thereof and after consideration of any defenses or objections by the guardian, the court may enter an order for its allowance and payment from the estate. Any action against the guardian of the estate as such shall be deemed a claim duly filed. [1990 c 122 § 19; 1975 1st ex.s. c 95 § 19; 1965 c 145 § 11.92.035.]

Effective date—1990 c 122: See note following RCW 11.88.005.

Actions against guardian: RCW 11.92.060.

Claims against estate of deceased incompetent or disabled person: RCW 11.88.150.

Disbursement for claims on termination of guardianship or limited guardianship: RCW 11.88.140.

11.92.040 Duties of guardian or limited guardian in general. It shall be the duty of the guardian or limited guardian of an estate:

(1) To file within three months after the guardian's appointment a verified inventory of all the property of the incapacitated person which comes into the guardian's possession or knowledge, including a statement of all encumbrances, liens, and other secured charges on any item;

(2) To file annually, within ninety days after the anniversary date of the guardian's or limited guardian's appointment, and also within thirty days after termination of the appointment, unless the court for good cause orders a different deadline to file following termination, a written verified account of the administration, which account shall contain at least the following information:

(a) Identification of property of the guardianship estate as of the date of the last account or, in the case of the initial account, as of the date of inventory;

(b) Identification of all additional property received into the guardianship, including income by source;

(c) Identification of all expenditures made during the account period by major categories;

(d) Any adjustments to the guardianship estate required to establish its present fair market value, including gains or losses on sale or other disposition and any mortgages, deeds

of trust or other encumbrances against the guardianship estate; and

(e) Identification of all property held in the guardianship estate as of the date of account, the assessed value of any real property and the guardian's estimate of the present fair market values of other property (including the basis on which such estimate is made), and the total net fair market value of the guardianship estate. In addition, immediately following such statement of present fair market value, the account shall set forth a statement of current amount of the guardian's bond and any other court-ordered protection for the security of the guardianship assets;

(3) The court in its discretion may allow reports at intervals of up to thirty-six months for estates with assets (exclusive of real property) having a value of not more than twice the homestead exemption. Notwithstanding contrary provisions of this section, the guardian or limited guardian of an estate need not file an annual report with the court if the funds of the guardianship are held for the benefit of a minor in a blocked account unless the guardian requests a withdrawal from such account, in which case the guardian shall provide a written verified account of the administration of the guardianship estate along with the guardian's petition for the withdrawal. The guardian or limited guardian shall report any substantial change in income or assets of the guardianship estate within thirty days of the occurrence of the change. A hearing shall be scheduled for court review and determination of provision for increased bond or other provision in accordance with RCW 11.88.100;

(4) To protect and preserve the guardianship estate, to apply it as provided in this chapter, to account for it faithfully, to perform all of the duties required by law, and at the termination of the guardianship or limited guardianship, to deliver the assets of the incapacitated person to the persons entitled thereto. Except as provided to the contrary herein, the court may authorize a guardian or limited guardian to do anything that a trustee can do under the provisions of RCW 11.98.070 for a period not exceeding one year from the date of the order or for a period corresponding to the interval in which the guardian's or limited guardian's report is required to be filed by the court pursuant to subsection (2) of this section, whichever period is longer;

(5) To invest and reinvest the property of the incapacitated person in accordance with the rules applicable to investment of trust estates by trustees as provided in chapter 11.100 RCW, except that:

(a) No investments shall be made without prior order of the court in any property other than unconditional interest bearing obligations of this state or of the United States and in obligations the interest and principal of which are unconditionally guaranteed by the United States, and in share accounts or deposits which are insured by an agency of the United States government. Such prior order of the court may authorize specific investments, or, in the discretion of the court, may authorize the guardian or limited guardian to invest and reinvest as provided in chapter 11.100 RCW without further order of the court;

(b) If it is for the best interests of the incapacitated person that a specific property be used by the incapacitated person rather than sold and the proceeds invested, the court may so order;

(6) To apply to the court no later than the filing of the inventory for an order authorizing disbursements on behalf of the incapacitated person: PROVIDED, HOWEVER, That the guardian or limited guardian of the estate, or the person, department, bureau, agency, or charitable organization having the care and custody of an incapacitated person, may apply to the court for an order directing the guardian or limited guardian of the estate to pay to the person, department, bureau, agency, or charitable organization having the care and custody of an incapacitated person, or if the guardian or limited guardian of the estate has the care and custody of the incapacitated person, directing the guardian or limited guardian of the estate to apply an amount weekly, monthly, quarterly, semi-annually, or annually, as the court may direct, to be expended in the care, maintenance, and education of the incapacitated person and of his or her dependents. In proper cases, the court may order payment of amounts directly to the incapacitated person for his or her maintenance or incidental expenses. The amounts authorized under this section may be decreased or increased from time to time by direction of the court. If payments are made to another under an order of the court, the guardian or limited guardian of the estate is not bound to see to the application thereof. [1991 c 289 § 10; 1990 c 122 § 20; 1985 c 30 § 9. Prior: 1984 c 149 § 12; 1979 c 32 § 2; 1977 ex.s. c 309 § 13; 1975 1st ex.s. c 95 § 20; 1965 c 145 § 11.92.040; prior: 1957 c 64 § 1; 1955 c 205 § 15; 1941 c 83 § 1; 1917 c 156 § 205; Rem. Supp. 1941 § 1575; prior: 1895 c 42 § 1; Code 1881 § 1614.]

Effective date—1990 c 122: See note following RCW 11.88.005.

Short title—Application—Purpose—Severability—1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability—Effective dates—1984 c 149: See notes following RCW 11.02.005.

Severability—1977 ex.s. c 309: See note following RCW 11.88.005.

Compulsory school attendance law, duty to comply with: RCW 28A.225.010.

Disabled person, defined: RCW 11.88.010.

11.92.043 Additional duties. It shall be the duty of the guardian or limited guardian of the person:

(1) To file within three months after appointment a personal care plan for the incapacitated person which shall include (a) an assessment of the incapacitated person's physical, mental, and emotional needs and of such person's ability to perform or assist in activities of daily living, and (b) the guardian's specific plan for meeting the identified and emerging personal care needs of the incapacitated person.

(2) To file annually or, where a guardian of the estate has been appointed, at the time an account is required to be filed under RCW 11.92.040, a report on the status of the incapacitated person, which shall include:

(a) The address and name of the incapacitated person and all residential changes during the period;

(b) The services or programs which the incapacitated person receives;

(c) The medical status of the incapacitated person;

(d) The mental status of the incapacitated person;

(e) Changes in the functional abilities of the incapacitated person;

(f) Activities of the guardian for the period;

(g) Any recommended changes in the scope of the authority of the guardian;

(h) The identity of any professionals who have assisted the incapacitated person during the period.

(3) To report to the court within thirty days any substantial change in the incapacitated person's condition, or any changes in residence of the incapacitated person.

(4) Consistent with the powers granted by the court, to care for and maintain the incapacitated person in the setting least restrictive to the incapacitated person's freedom and appropriate to the incapacitated person's personal care needs, assert the incapacitated person's rights and best interests, and if the incapacitated person is a minor or where otherwise appropriate, to see that the incapacitated person receives appropriate training and education and that the incapacitated person has the opportunity to learn a trade, occupation, or profession.

(5) Consistent with RCW 7.70.065, to provide timely, informed consent for health care of the incapacitated person, except in the case of a limited guardian where such power is not expressly provided for in the order of appointment or subsequent modifying order as provided in RCW 11.88.125 as now or hereafter amended, the standby guardian or standby limited guardian may provide timely, informed consent to necessary medical procedures if the guardian or limited guardian cannot be located within four hours after the need for such consent arises. No guardian, limited guardian, or standby guardian may involuntarily commit for mental health treatment, observation, or evaluation an alleged incapacitated person who is unable or unwilling to give informed consent to such commitment unless the procedures for involuntary commitment set forth in chapter 71.05 or 72.23 RCW are followed. Nothing in this section shall be construed to allow a guardian, limited guardian, or standby guardian to consent to:

(a) Therapy or other procedure which induces convulsion;

(b) Surgery solely for the purpose of psychosurgery;

(c) Other psychiatric or mental health procedures that restrict physical freedom of movement, or the rights set forth in *RCW 71.05.370.

A guardian, limited guardian, or standby guardian who believes these procedures are necessary for the proper care and maintenance of the incapacitated person shall petition the court for an order unless the court has previously approved the procedure within the past thirty days. The court may order the procedure only after an attorney is appointed in accordance with RCW 11.88.045 if no attorney has previously appeared, notice is given, and a hearing is held in accordance with RCW 11.88.040. [1991 c 289 § 11; 1990 c 122 § 21.]

*Reviser's note: RCW 71.05.370 was recodified as RCW 71.05.217 pursuant to 2005 c 504 § 108, effective July 1, 2005.

Effective date—1990 c 122: See note following RCW 11.88.005.

11.92.050 Intermediate accounts—Hearing—Order. (1) Upon the filing of any intermediate guardianship or limited guardianship account required by statute, or of any intermediate account required by court rule or order, the guardian or limited guardian may petition the court for an order settling his or her account with regard to any receipts, expenditures, and investments made and acts done by the guardian or limited guardian to the date of the interim report. Upon such petition being filed, the court may in its discretion, where the size or condition of the estate warrants it, set a date for the hearing of the petition and require the service of the petition and a notice of the hearing as provided in RCW 11.88.040 as now or hereafter amended; and, in the event a hearing is ordered, the court may also appoint a guardian ad litem, whose duty it shall be to investigate the report of the guardian or limited guardian of the estate and to advise the court thereon at the hearing, in writing. At the hearing on the report of the guardian or limited guardian, if the court is satisfied that the actions of the guardian or limited guardian have been proper, and that the guardian or limited guardian has in all respects discharged his or her trust with relation to the receipts, expenditures, investments, and acts, then, in such event, the court shall enter an order approving such account. If the court has appointed a guardian ad litem, the order shall be final and binding upon the incapacitated person, subject only to the right of appeal as upon a final order; provided that at the time of final account of said guardian or limited guardian or within one year after the incapacitated person attains his or her majority any such interim account may be challenged by the incapacitated person on the ground of fraud.

(2) The procedure established in subsection (1) of this section for financial accounts by guardians or limited guardians of the estate shall apply to personal care reports filed by guardians or limited guardians of the person under RCW 11.92.043. [1995 c 297 § 6; 1990 c 122 s 23; 1975 1st ex.s. c 95 s 21; 1965 c 145 s 11.92.050. Prior: 1943 c 29 s 1; Rem. Supp. 1943 s 1575-1.]

Effective date—1990 c 122: See note following RCW 11.88.005.

11.92.053 Settlement of estate upon termination. Within ninety days after the termination of a guardianship for any reason, the guardian or limited guardian of the estate shall petition the court for an order settling his or her account as filed in accordance with RCW 11.92.040(2) with regard to any receipts, expenditures, and investments made and acts done by the guardian to the date of the termination. Upon the filing of the petition, the court shall set a date for the hearing of the petition after notice has been given in accordance with RCW 11.88.040. Any person interested may file objections to the petition or may appear at the time and place fixed for the hearing thereof and present his or her objections thereto. The court may take such testimony as it deems proper or necessary to determine whether an order settling the account should be issued and the transactions of the guardian be approved, and the court may appoint a guardian ad litem to review the report.

At the hearing on the petition of the guardian or limited guardian, if the court is satisfied that the actions of the guardian or limited guardian have been proper, and that the guardian has in all respects discharged his or her trust with relation to the receipts, expenditures, investments, and acts, then, in such event, the court shall enter an order approving the account, and the order shall be final and binding upon the incapacitated person, subject only to the right of appeal as upon a final order. However, within one year after the incompetent attains his or her majority any such account may be challenged by the incapacitated person on the ground of

fraud. [1995 c 297 § 7; 1990 c 122 § 24; 1965 c 145 § 11.92.053.]

Effective date—1990 c 122: See note following RCW 11.88.005.

Administration of deceased incompetent's estate: RCW 11.88.150.

Procedure on removal or death of guardian—Delivery of estate to successor: RCW 11.88.120.

Termination of guardianship: RCW 11.88.140.

11.92.056 Citation of surety on bond. If, at any hearing upon a petition to settle the account of any guardian or limited guardian, it shall appear to the court that said guardian or limited guardian has not fully accounted or that said account should not be settled, the court may continue said hearing to a day certain and may cite the surety or sureties upon the bond of said guardian or limited guardian to appear upon the date fixed in said citation and show cause why the account should not be disapproved and judgment entered for any deficiency against said guardian or limited guardian and the surety or sureties upon his or her bond. Said citation shall be personally served upon said surety or sureties in the manner provided by law for the service of summons in civil actions and shall be served not less than twenty days previous to said hearing. At said hearing any interested party, including the surety so cited, shall have the right to introduce any evidence which shall be material to the matter before the court. If, at said hearing, the final account of said guardian or limited guardian shall not be approved and the court shall find that said guardian or limited guardian is indebted to the incapacitated person in any amount, said court may thereupon enter final judgment against said guardian or limited guardian and the surety or sureties upon his or her bond, which judgment shall be enforceable in the same manner and to the same extent as judgments in ordinary civil actions. [1990 c 122 § 25; 1975 1st ex.s. c 95 § 22; 1965 c 145 § 11.92.056.]

Effective date—1990 c 122: See note following RCW 11.88.005.

11.92.060 Guardian to represent incapacitated person—Compromise of claims—Service of process. (1) GUARDIAN MAY SUE AND BE SUED. When there is a guardian of the estate, all actions between the incapacitated person or the guardian and third persons in which it is sought to charge or benefit the estate of the incapacitated person shall be prosecuted by or against the guardian of the estate as such. The guardian shall represent the interests of the incapacitated person in the action and all process shall be served on him or her. A guardian or limited guardian of the estate shall report to the court any action commenced against the incapacitated person and shall secure court approval prior to initiating any legal action in the name of the incapacitated person.

(2) JOINDER, AMENDMENT AND SUBSTITUTION. When the guardian of the estate is under personal liability for his or her own contracts and acts made and performed on behalf of the estate the guardian may be sued both as guardian and in his or her personal capacity in the same action. Misnomer or the bringing of the action by or against the incapacitated person shall not be grounds for dismissal of the action and leave to amend or substitute shall be freely granted. If an action was commenced by or against the incapacitated person before the appointment of a guardian of his or her estate, such guardian when appointed may be substituted as a party for the incapacitated person. If the appointment of the guardian of the estate is terminated, his or her successor may be substituted; if the incapacitated person dies, his or her personal representative may be substituted; if the incapacitated person is no longer incapacitated the person may be substituted.

(3) GARNISHMENT, ATTACHMENT AND EXECUTION. When there is a guardian of the estate, the property and rights of action of the incapacitated person shall not be subject to garnishment or attachment, except for the foreclosure of a mortgage or other lien, and execution shall not issue to obtain satisfaction of any judgment against the incapacitated person or the guardian of the person's estate as such.

(4) COMPROMISE BY GUARDIAN. Whenever it is proposed to compromise or settle any claim by or against the incapacitated person or the guardian as such, whether arising as a result of personal injury or otherwise, and whether arising before or after appointment of a guardian, the court on petition of the guardian of the estate, if satisfied that such compromise or settlement will be for the best interests of the incapacitated person, may enter an order authorizing the settlement or compromise be made.

(5) LIMITED GUARDIAN. Limited guardians may serve and be served with process or actions on behalf of the incapacitated person, but only to the extent provided for in the court order appointing a limited guardian. [1990 c 122 § 26; 1975 1st ex.s. c 95 § 23; 1965 c 145 § 11.92.060. Prior: 1917 c 156 § 206; RRS § 1576; prior: 1903 c 100 § 1; Code 1881 § 1611; 1860 p 226 § 328.]

Rules of court: *SPR 98.08W, 98.10W, 98.16W.*

Effective date—1990 c 122: See note following RCW 11.88.005.

Action against guardian deemed claim: RCW 11.92.035.

11.92.090 Sale, exchange, lease, or mortgage of property. Whenever it shall appear to the satisfaction of a court by the petition of any guardian or limited guardian, that it is necessary or proper to sell, exchange, lease, mortgage, or grant an easement, license or similar interest in any of the real or personal property of the estate of the incapacitated person for the purpose of paying debts or for the care, support and education of the incapacitated person, or to redeem any property of the incapacitated person's estate covered by mortgage or other lien, or for the purpose of making any investments, or for any other purpose which to the court may seem right and proper, the court may make an order directing such sale, exchange, lease, mortgage, or grant of easement, license or similar interest of such part or parts of the real or personal property as shall to the court seem proper. [1990 c 122 § 27; 1975 1st ex.s. c 95 § 24; 1965 c 145 § 11.92.090. Prior: 1917 c 156 § 212; RRS § 1582; prior: Code 1881 § 1620; 1855 p 17 § 14.]

Effective date—1990 c 122: See note following RCW 11.88.005.

11.92.096 Guardian access to certain held assets. (1) All financial institutions as defined in RCW 30.22.040(12), all insurance companies holding a certificate of authority under chapter 48.05 RCW, or any agent who constitutes a salesperson or broker-dealer of securities under the defini-

tions of RCW 21.20.005 (hereafter individually and collectively referenced as "institution") shall provide the guardian access and control over the asset(s) described in (a)(vii) of this subsection, including but not limited to delivery of the asset to the guardian, upon receipt of the following:

(a) An affidavit containing as an attachment a true and correct copy of the guardian's letters of guardianship and stating:

(i) That as of the date of the affidavit, the affiant is a duly appointed guardian with authority over assets held by the institution but owned or subject to withdrawal or delivery to a client or depositor of the institution;

(ii) The cause number of the guardianship;

(iii) The name of the incapacitated person and the name of the client or depositor (which names shall be the same);

(iv) The account or the safety deposit box number or numbers;

(v) The address of the client or depositor;

(vi) The name and address of the affiant-guardian being provided assets or access to assets;

(vii) A description of and the value of the asset or assets, or, where the value cannot be readily ascertained, a reasonable estimate thereof, and a statement that the guardian receives delivery or control of each asset solely in its capacity as guardian;

(viii) The date the guardian assumed control over the assets; and

(ix) That a true and correct copy of the letters of guardianship duly issued by a court to the guardian is attached to the affidavit; and

(b) An envelope, with postage prepaid, addressed to the clerk of the court issuing the letters of guardianship.

The affidavit shall be sent in the envelope by the institution to the clerk of the court together with a statement signed by an agent of the institution that the description of the asset set forth in the affidavit appears to be accurate, and confirming in the case of cash assets, the value of the asset.

(2) Any guardian provided with access to a safe deposit box pursuant to subsection (1) of this section shall make an inventory of the contents of the box and attach this inventory to the affidavit before the affidavit is sent to the clerk of the court and before the contents of the box are released to the guardian. Any inventory shall be prepared in the presence of an employee of the institution and the statement of the institution required under subsection (1) of this section shall include a statement executed by the employee that the inventory appears to be accurate. The institution may require payment by the guardian of any fees or charges then due in connection with the asset or account and of a reasonable fee for witnessing preparation of the inventory and preparing the statement required by this subsection or subsection (1) of this section.

(3) Any institution to which an affidavit complying with subsection (1) of this section is submitted may rely on the affidavit without inquiry and shall not be subject to any liability of any nature whatsoever to any person whatsoever, including but not limited to the institution's client or depositor or any other person with an ownership or other interest in or right to the asset, for the reliance or for providing the guardian access and control over the asset, including but not limited to delivery of the asset to the guardian. [1991 c 289 § 13.]

11.92.100 Petition—Contents. Such application shall be by petition, verified by the oath of the guardian or limited guardian, and shall substantially set forth:

(1) The value and character of all personal estate belonging to the incapacitated person that has come to the knowledge or possession of such guardian or limited guardian.

(2) The disposition of such personal estate.

(3) The amount and condition of the incapacitated person's personal estate, if any, dependent upon the settlement of any estate, or the execution of any trust.

(4) The annual income of the real estate of the incapacitated person.

(5) The amount of rent received and the application thereof.

(6) The proposed manner of reinvesting the proceeds of the sale, if asked for that purpose.

(7) Each item of indebtedness, or the amount and character of the lien, if the sale is requested for the liquidation thereof.

(8) The age of the incapacitated person, where and with whom residing.

(9) All other facts connected with the estate and condition of the incapacitated person necessary to enable the court to fully understand the same. If there is no personal estate belonging to the incapacitated person in possession or expectancy, and none has come into the hands of such guardian or limited guardian, and no rents have been received, the fact shall be stated in the application. [1990 c 122 § 28; 1975 1st ex.s. c 95 § 25; 1965 c 145 § 11.92.100. Prior: 1917 c 156 § 213; RRS § 1583; prior: Code 1881 § 1621; 1860 p 228 § 338; 1855 p 17 § 15.]

Effective date—1990 c 122: See note following RCW 11.88.005.

11.92.110 Sale of real estate. The order directing the sale of any of the real property of the estate of the incapacitated person shall specify the particular property affected and the method, whether by public or private sale or by negotiation, and terms thereof, and with regard to the procedure and notices to be employed in conducting such sale, the provisions of RCW 11.56.060, 11.56.070, 11.56.080, and 11.56.110 shall be followed unless the court otherwise directs. [1990 c 122 § 29; 1975 1st ex.s. c 95 § 26; 1965 c 145 § 11.92.110. Prior: 1917 c 156 § 214; RRS § 1524; prior: Code 1881 § 1623; 1860 p 229 § 340.]

Effective date—1990 c 122: See note following RCW 11.88.005.

11.92.115 Return and confirmation of sale. The guardian or limited guardian making any sale of real estate, either at public or private sale or sale by negotiation, shall within ten days after making such sale file with the clerk of the court his return of such sale, the same being duly verified. At any time after the expiration of ten days from the filing of such return, the court may, without notice, approve and confirm such sale and direct proper instruments of transfer to be executed and delivered. Upon the confirmation of any such sale, the court shall direct the guardian or limited guardian to make, execute and deliver instruments conveying the title to

the person to whom such property may be sold and such instruments of conveyance shall be deemed to convey all the estate, rights and interest of the incapacitated person and of the person's estate. In the case of a sale by negotiation the guardians or limited guardians shall publish a notice in one issue of a legal newspaper published in the county in which the estate is being administered; the substance of such notice shall include the legal description of the property sold, the selling price and the date after which the sale may be confirmed: PROVIDED, That such confirmation date shall be at least ten days after such notice is published. [1990 c 122 § 30; 1975 1st ex.s. c 95 § 27; 1965 c 145 § 11.92.115.]

Effective date—1990 c 122: See note following RCW 11.88.005.

11.92.120 Confirmation conclusive. No sale by any guardian or limited guardian of real or personal property shall be void or be set aside or be attacked because of any irregularities whatsoever, and none of the steps leading up to such sale or the confirmation thereof shall be jurisdictional, and the confirmation by the court of any such sale shall be conclusive as to the regularity and legality of such sale or sales, and the passing of title after confirmation by the court shall vest an absolute title in the purchaser, and such instrument of transfer may not be attacked for any purpose or any reason, except for fraud. [1975 1st ex.s. c 95 § 28; 1965 c 145 § 11.92.120. Prior: 1917 c 156 § 215; RRS § 1585; prior: Code 1881 § 1625; 1860 p 229 § 343.]

11.92.125 Broker's fee and closing expenses—Sale, exchange, mortgage, or lease of real estate. In connection with the sale, exchange, mortgage, lease, or grant of easement or license in any property, the court may authorize the guardian or limited guardian to pay, out of the proceeds realized therefrom or out of the estate, the customary and reasonable auctioneer's and broker's fees and any necessary expenses for abstracting title insurance, survey, revenue stamps, and other necessary costs and expenses in connection therewith. [1977 ex.s. c 309 § 15; 1965 c 145 § 11.92.125.]

Severability—1977 ex.s. c 309: See note following RCW 11.88.005.

11.92.130 Performance of contracts. If any person who is bound by contract in writing to perform shall become incapacitated before making the performance, the court having jurisdiction of the guardianship or limited guardianship of such property may, upon application of the guardian or limited guardian of the incapacitated person, or upon application of the person claiming to be entitled to the performance, make an order authorizing and directing the guardian or limited guardian to perform such contract. The application and the proceedings, shall, as nearly as may be, be the same as provided in chapter 11.60 RCW. [1990 c 122 § 31; 1975 1st ex.s. c 95 § 29; 1965 c 145 § 11.92.130. Prior: 1923 c 142 § 5; RRS § 1585a.]

Effective date—1990 c 122: See note following RCW 11.88.005.

11.92.140 Court authorization for actions regarding guardianship funds. The court, upon the petition of a guardian of the estate of an incapacitated person other than the guardian of a minor, and after such notice as the court directs and other notice to all persons interested as required by chapter 11.96A RCW, may authorize the guardian to take any action, or to apply funds not required for the incapacitated person's own maintenance and support, in any fashion the court approves as being in keeping with the incapacitated person's wishes so far as they can be ascertained and as designed to minimize insofar as possible current or prospective state or federal income and estate taxes, permit entitlement under otherwise available federal or state medical or other assistance programs, and to provide for gifts to such charities, relatives, and friends as would be likely recipients of donations from the incapacitated person.

The action or application of funds may include but shall not be limited to the making of gifts, to the conveyance or release of the incapacitated person's contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to the exercise or release of the incapacitated person's powers as donee of a power of appointment, the making of contracts, the creation of revocable or irrevocable trusts of property of the incapacitated person's estate which may extend beyond the incapacitated person's disability or life, the establishment of custodianships for the benefit of a minor under chapter 11.114 RCW, the Washington uniform transfers to minors act, the exercise of options of the incapacitated person to purchase securities or other property, the exercise of the incapacitated person's right to elect options and to change beneficiaries under insurance and annuity policies and the surrendering of policies for their cash value, the exercise of the incapacitated person's right to any elective share in the estate of the incapacitated person's deceased spouse, and the renunciation or disclaimer of any interest acquired by testate or intestate succession or by inter vivos transfer.

The guardian in the petition shall briefly outline the action or application of funds for which approval is sought, the results expected to be accomplished thereby and the savings expected to accrue. The proposed action or application of funds may include gifts of the incapacitated person's personal or real property. Gifts may be for the benefit of prospective legatees, devisees, or heirs apparent of the incapacitated person, or may be made to individuals or charities in which the incapacitated person is believed to have an interest. Gifts may or may not, in the discretion of the court, be treated as advancements to donees who would otherwise inherit property from the incapacitated person under the incapacitated person's will or under the laws of descent and distribution. The guardian shall also indicate in the petition that any planned disposition is consistent with the intentions of the incapacitated person insofar as the intentions can be ascertained, and if the incapacitated person's intentions cannot be ascertained, the incapacitated person will be presumed to favor reduction in the incidence of the various forms of taxation and the partial distribution of the incapacitated person's estate as provided in this section. The guardian shall not, however, be required to include as a beneficiary any person whom there is reason to believe would be excluded by the incapacitated person. No guardian may be required to file a petition as provided in this section, and a failure or refusal to so petition the court does not constitute a breach of the guardian's fiduciary duties. [1999 c 42 § 616; 1991 c 193 § 32; 1990 c 122 § 32; 1985 c 30 § 10. Prior: 1984 c 149 § 13.]

Part headings and captions not law—Effective date—1999 c 42: See RCW 11.96A.901 and 11.96A.902.

Effective date—Severability—1991 c 193: See RCW 11.114.903 and 11.114.904.

Effective date—1990 c 122: See note following RCW 11.88.005.

Short title—Application—Purpose—Severability—1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability—Effective dates—1984 c 149: See notes following RCW 11.02.005.

11.92.150 Request for special notice of proceedings. At any time after the issuance of letters of guardianship in the estate of any person and/or incapacitated person, any person interested in the estate, or in the incapacitated person, or any relative of the incapacitated person, or any authorized representative of any agency, bureau, or department of the United States government from or through which any compensation, insurance, pension or other benefit is being paid, or is payable, may serve upon the guardian or limited guardian, or upon the attorney for the guardian or limited guardian, and file with the clerk of the court where the guardianship or limited guardianship of the person and/or estate is pending, a written request stating the specific actions of which the applicant requests advance notice. Where the notice does not specify matters for which notice is requested, the guardian or limited guardian shall provide copies of all documents filed with the court and advance notice of his or her application for court approval of any action in the guardianship.

The request for special written notice shall designate the name, address and post office address of the person upon whom the notice is to be served and no service shall be required under this section and RCW 11.92.160 as now or hereafter amended other than in accordance with the designation unless and until a new designation has been made.

When any account, report, petition, or proceeding is filed in the estate of which special written notice is requested, the court shall fix a time for hearing which shall allow at least ten days for service of the notice before the hearing; and notice of the hearing shall be served upon the person designated in the written request at least ten days before the date fixed for the hearing. The service may be made by leaving a copy with the person designated, or that person's authorized representative, or by mailing through the United States mail, with postage prepaid to the person and place designated. [1990 c 122 § 33; 1985 c 30 § 11. Prior: 1984 c 149 § 14; 1975 1st ex.s. c 95 § 30; 1969 c 18 § 1; 1965 c 145 § 11.92.150; prior: 1925 ex.s. c 104 § 1; RRS § 1586-1.]

Effective date—1990 c 122: See note following RCW 11.88.005.

Short title—Application—Purpose—Severability—1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability—Effective dates—1984 c 149: See notes following RCW 11.02.005.

11.92.160 Citation for failure to file account or report. Whenever any request for special written notice is served as provided in this section and RCW 11.92.150 as now or hereafter amended, the person making such request may, upon failure of any guardian or limited guardian for any incapacitated person, to file any account or report required by law, petition the court administering such estate for a citation requiring such guardian or limited guardian to file such report or account, or to show cause for failure to do so, and thereupon the court shall issue such citation and hold a hearing thereon and enter such order as is required by the law and the facts. [1990 c 122 § 34; 1975 1st ex.s. c 95 § 31; 1965 c 145 § 11.92.160. Prior: 1925 ex.s. c 104 § 2; RRS § 1586-2.]

Effective date—1990 c 122: See note following RCW 11.88.005.

Attorney's fee to contestant of erroneous account or report: RCW 11.76.070.

11.92.170 Removal of property of nonresident incapacitated person. Whenever it is made to appear that it would be in the best interests of the incapacitated person, the court may order the transfer of property in this state to a guardian or limited guardian of the estate of the incapacitated person appointed in another jurisdiction, or to a person or institution having similar authority with respect to the incapacitated person. [1990 c 122 § 35; 1977 ex.s. c 309 § 16; 1975 1st ex.s. c 95 § 32; 1965 c 145 § 11.92.170. Prior: 1917 c 156 § 217; RRS § 1587; prior: Code 1881 § 1628; 1873 p 320 § 323.]

Effective date—1990 c 122: See note following RCW 11.88.005.

Severability—1977 ex.s. c 309: See note following RCW 11.88.005.

11.92.180 Compensation and expenses of guardian or limited guardian—Attorney's fees—Department of social and health services clients paying part of costs—Rules. A guardian or limited guardian shall be allowed such compensation for his or her services as guardian or limited guardian as the court shall deem just and reasonable. Guardians and limited guardians shall not be compensated at county or state expense. Additional compensation may be allowed for other administrative costs, including services of an attorney and for other services not provided by the guardian or limited guardian. Where a guardian or limited guardian is an attorney, the guardian or limited guardian shall separately account for time for which compensation is requested for services as a guardian or limited guardian as contrasted to time for which compensation for legal services provided to the guardianship is requested. In all cases, compensation of the guardian or limited guardian and his or her expenses including attorney's fees shall be fixed by the court and may be allowed at any annual or final accounting; but at any time during the administration of the estate, the guardian or limited guardian or his or her attorney may apply to the court for an allowance upon the compensation or necessary expenses of the guardian or limited guardian and for attorney's fees for services already performed. If the court finds that the guardian or limited guardian has failed to discharge his or her duties as such in any respect, it may deny the guardian any compensation whatsoever or may reduce the compensation which would otherwise be allowed. Where the incapacitated person is a department of social and health services client residing in a nursing facility or in a residential or home setting and is required by the department of social and health services to contribute a portion of their income towards the cost of residential or supportive services then the department shall be entitled to notice of proceedings as described in RCW 11.92.150. The amount of guardianship fees and additional compensation for administrative costs shall not exceed the amount allowed by the department of social and health

services by rule. [1995 c 297 § 8; 1994 c 68 § 1; 1991 c 289 § 12; 1990 c 122 § 36; 1975 1st ex.s. c 95 § 33; 1965 c 145 § 11.92.180. Prior: 1917 c 156 § 216; RRS § 1586; prior: Code 1881 § 1627; 1855 p 19 § 25.]

Rules of court: *SPR 98.12W.*

Effective date—1990 c 122: See note following RCW 11.88.005.

11.92.185 Concealed or embezzled property. The court shall have authority to bring before it, in the manner prescribed by RCW 11.48.070, any person or persons suspected of having in his or her possession or having concealed, embezzled, conveyed or disposed of any of the property of the estate of incapacitated persons subject to administration under this title. [1990 c 122 § 37; 1975 1st ex.s. c 95 § 34; 1965 c 145 § 11.92.185.]

Effective date—1990 c 122: See note following RCW 11.88.005.

11.92.190 Detention of person in residential placement facility against will prohibited—Effect of court order—Service of notice of residential placement. No residential treatment facility which provides nursing or other care may detain a person within such facility against their will. Any court order, other than an order issued in accordance with the involuntary treatment provisions of chapters 10.77, 71.05, and 72.23 RCW, which purports to authorize such involuntary detention or purports to authorize a guardian or limited guardian to consent to such involuntary detention on behalf of an incapacitated person shall be void and of no force or effect. This section does not apply to the detention of a minor as provided in chapter 70.96A or 71.34 RCW.

Nothing in this section shall be construed to require a court order authorizing placement of an incapacitated person in a residential treatment facility if such order is not otherwise required by law: PROVIDED, That notice of any residential placement of an incapacitated person shall be served, either before or after placement, by the guardian or limited guardian on such person, the guardian ad litem of record, and any attorney of record. [1996 c 249 § 11; 1977 ex.s. c 309 § 14.]

Intent—1996 c 249: See note following RCW 2.56.030.

Severability—1977 ex.s. c 309: See note following RCW 11.88.005.

Chapter 11.94 RCW
POWER OF ATTORNEY

Sections

11.94.010 Designation—Authority—Effect of acts done—Appointment of guardian, effect—Accounting—Reliance on instrument. (1) Whenever a principal designates another as his or her attorney in fact or agent, by a power of attorney in writing, and the writing contains the words "This power of attorney shall not be affected by disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's disability, the authority of the attorney in fact or agent is exercisable on behalf of the principal as provided notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney in fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or the principal's guardian or heirs, devisees, and personal representative as if the principal were alive, competent, and not disabled. A principal may nominate, by a durable power of attorney, the guardian or limited guardian of his or her estate or person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification. If a guardian thereafter is appointed for the principal, the attorney in fact or agent, during the continuance of the appointment, shall account to the guardian rather than the principal. The guardian has the same power the principal would have had if the principal were not disabled or incompetent, to revoke, suspend or terminate all or any part of the power of attorney or agency.

(2) Persons shall place reasonable reliance on any determination of disability or incompetence as provided in the instrument that specifies the time and the circumstances under which the power of attorney document becomes effective.

(3)(a) A principal may authorize his or her attorney-in-fact to provide informed consent for health care decisions on the principal's behalf. If a principal has appointed more than one agent with authority to make mental health treatment decisions in accordance with a directive under chapter 71.32 RCW, to the extent of any conflict, the most recently appointed agent shall be treated as the principal's agent for mental health treatment decisions unless provided otherwise in either appointment.

(b) Unless he or she is the spouse, or adult child or brother or sister of the principal, none of the following persons may act as the attorney-in-fact for the principal: Any of the principal's physicians, the physicians' employees, or the owners, administrators, or employees of the health care facility or long-term care facility as defined in RCW 43.190.020 where the principal resides or receives care. Except when the principal has consented in a mental health advance directive executed under chapter 71.32 RCW to inpatient admission or

11.96A.010 Purpose. The overall purpose of this chapter is to set forth generally applicable statutory provisions for the resolution of disputes and other matters involving trusts and estates in a single chapter under Title 11 RCW. The provisions are intended to provide nonjudicial methods for the resolution of matters, such as mediation, arbitration, and agreement. The [This] chapter also provides for judicial resolution of disputes if other methods are unsuccessful. [1999 c 42 § 102.]

11.96A.020 General power of courts—Intent—Plenary power of the court. (1) It is the intent of the legislature that the courts shall have full and ample power and authority under this title to administer and settle:

(a) All matters concerning the estates and assets of incapacitated, missing, and deceased persons, including matters involving nonprobate assets and powers of attorney, in accordance with this title; and

(b) All trusts and trust matters.

(2) If this title should in any case or under any circumstance be inapplicable, insufficient, or doubtful with reference to the administration and settlement of the matters listed in subsection (1) of this section, the court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court. [1999 c 42 § 103.]

11.96A.030 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Matter" includes any issue, question, or dispute involving:

(a) The determination of any class of creditors, devisees, legatees, heirs, next of kin, or other persons interested in an estate, trust, nonprobate asset, or with respect to any other asset or property interest passing at death;

(b) The direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity;

(c) The determination of any question arising in the administration of an estate or trust, or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, that may include, without limitation, questions relating to: (i) The construction of wills, trusts, community property agreements, and other writings; (ii) a change of personal representative or trustee; (iii) a change of the situs of a trust; (iv) an accounting from a personal representative or trustee; or (v) the determination of fees for a personal representative or trustee;

(d) The grant to a personal representative or trustee of any necessary or desirable power not otherwise granted in the governing instrument or given by law;

(e) The amendment, reformation, or conformation of a will or a trust instrument to comply with statutes and regulations of the United States internal revenue service in order to achieve qualification for deductions, elections, and other tax requirements, including the qualification of any gift thereunder for the benefit of a surviving spouse who is not a citizen of the United States for the estate tax marital deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a qualified domestic trust under section 2056A of the internal revenue code, the qualification of any gift thereunder as a qualified conservation easement as permitted by federal law, or the qualification of any gift for the charitable estate tax deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust; and

(f) With respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, including joint tenancy property, property subject to a community property agreement, or assets subject to a pay on death or transfer on death designation:

(i) The ascertaining of any class of creditors or others for purposes of chapter 11.18 or 11.42 RCW;

(ii) The ordering of a qualified person, the notice agent, or resident agent, as those terms are defined in chapter 11.42 RCW, or any combination of them, to do or abstain from doing any particular act with respect to a nonprobate asset;

(iii) The ordering of a custodian of any of the decedent's records relating to a nonprobate asset to do or abstain from doing any particular act with respect to those records;

(iv) The determination of any question arising in the administration under chapter 11.18 or 11.42 RCW of a nonprobate asset;

(v) The determination of any questions relating to the abatement, rights of creditors, or other matter relating to the administration, settlement, or final disposition of a nonprobate asset under this title;

all judicial proceedings under this title that require notice, the notice must be personally served on or mailed to all parties or the parties' virtual representatives at least twenty days before the hearing on the petition unless a different period is provided by statute or ordered by the court. The date of service shall be determined under the rules of civil procedure.

(2) Proof of the service or mailing required in this section must be made by affidavit or declaration filed at or before the hearing. [1999 c 42 § 304.]

11.96A.115 Discovery. In all matters governed by this title, discovery shall be permitted only in the following matters:

(1) A judicial proceeding that places one or more specific issues in controversy that has been commenced under RCW 11.96A.100, in which case discovery shall be conducted in accordance with the superior court civil rules and applicable local rules; or

(2) A matter in which the court orders that discovery be permitted on a showing of good cause, in which case discovery shall be conducted in accordance with the superior court civil rules and applicable local rules unless otherwise limited by the order of the court. [2006 c 360 § 11.]

Clarification of laws—Enforceability of act—Severability—2006 c 360: See notes following RCW 11.108.070.

11.96A.120 Application of doctrine of virtual representation. (1) This section is intended to adopt the common law concept of virtual representation. This section supplements the common law relating to the doctrine of virtual representation and shall not be construed as limiting the application of that common law doctrine.

(2) Any notice requirement in this title is satisfied if notice is given as follows:

(a) Where an interest in an estate, trust, or nonprobate asset or an interest that may be affected by a power of attorney has been given to persons who comprise a certain class upon the happening of a certain event, notice may be given to the living persons who would constitute the class if the event had happened immediately before the commencement of the proceeding requiring notice, and the persons shall virtually represent all other members of the class;

(b) Where an interest in an estate, trust, or nonprobate asset or an interest that may be affected by a power of attorney has been given to a living person, and the same interest, or a share in it, is to pass to the surviving spouse or to persons who are, or might be, the distributees, heirs, issue, or other kindred of that living person upon the happening of a future event, notice may be given to that living person, and the living person shall virtually represent the surviving spouse, distributees, heirs, issue, or other kindred of the person; and

(c) Except as otherwise provided in this subsection, where an interest in an estate, trust, or nonprobate asset or an interest that may be affected by a power of attorney has been given to a person or a class of persons, or both, upon the happening of any future event, and the same interest or a share of the interest is to pass to another person or class of persons, or both, upon the happening of an additional future event, notice may be given to the living person or persons who would take the interest upon the happening of the first event, and the living person or persons shall virtually represent the persons and classes of persons who might take on the happening of the additional future event.

(3) A party is not virtually represented by a person receiving notice if a conflict of interest involving the matter is known to exist between the notified person and the party.

(4) An action taken by the court is conclusive and binding upon each person receiving actual or constructive notice or who is otherwise virtually represented. [2001 c 203 § 11; 1999 c 42 § 305.]

11.96A.130 Special notice. Nothing in this chapter eliminates the requirement to give notice to a person who has requested special notice under RCW 11.28.240 or 11.92.150. [1999 c 42 § 306.]

11.96A.140 Waiver of notice. Notwithstanding any other provision of this title, notice of a hearing does not need to be given to a legally competent person who has waived in writing notice of the hearing in person or by attorney, or who has appeared at the hearing without objecting to the lack of proper notice or personal jurisdiction. The waiver of notice may apply either to a specific hearing or to any and all hearings and proceedings to be held, in which event the waiver of notice is of continuing effect unless subsequently revoked by the filing of a written notice of revocation of the waiver and the mailing of a copy of the notice of revocation of the waiver to the other parties. Unless notice of a hearing is required to be given by publication, if all persons entitled to notice of the hearing waive the notice or appear at the hearing without objecting to the lack of proper notice or personal jurisdiction, the court may hear the matter immediately. A guardian of the estate or a guardian ad litem may make the waivers on behalf of the incapacitated person, and a trustee may make the waivers on behalf of any competent or incapacitated beneficiary of the trust. A consul or other representative of a foreign government, whose appearance has been entered as provided by law on behalf of any person residing in a foreign country, may make the waiver of notice on behalf of the person. [1999 c 42 § 307.]

11.96A.150 Cost—Attorneys' fees. (1) Either the superior court or the court on appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This statute [section] shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of *RCW 11.88.090(9). [1999 c 42 § 308.]

*Reviser's note: RCW 11.88.090 was amended by 1999 c 360 § 1, changing subsection (9) to subsection (10).

11.96A.160 Appointment of guardian ad litem. (1) The court, upon its own motion or upon request of one or more of the parties, at any stage of a judicial proceeding or at any time in a nonjudicial resolution procedure, may appoint a guardian ad litem to represent the interests of a minor, incapacitated, unborn, or unascertained person, person whose identity or address is unknown, or a designated class of persons who are not ascertained or are not in being. If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.

(2) The court-appointed guardian ad litem supersedes the special representative if so provided in the court order.

(3) The court may appoint the guardian ad litem at an ex parte hearing, or the court may order a hearing as provided in RCW 11.96A.090 with notice as provided in this section and RCW 11.96A.110.

(4) The guardian ad litem is entitled to reasonable compensation for services. Such compensation is to be paid from the principal of the estate or trust whose beneficiaries are represented. [1999 c 42 § 309.]

11.96A.170 Trial by jury. If a party is entitled to a trial by jury and a jury is demanded, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice, shall settle and frame the issues to be tried. If a jury is not demanded, the court shall try the issues, and sign and file its findings and decision in writing, as provided for in civil actions. [1999 c 42 § 310.]

11.96A.180 Execution on judgments. Judgment on the issues, as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions. [1999 c 42 § 311.]

11.96A.190 Execution upon trust income or vested remainder—Permitted, when. Nothing in RCW 6.32.250 shall forbid execution upon the income of any trust created by a person other than the judgment debtor for debt arising through the furnishing of the necessities of life to the beneficiary of such trust; or as to such income forbid the enforcement of any order of the superior court requiring the payment of support for the children under the age of eighteen of any beneficiary; or forbid the enforcement of any order of the superior court subjecting the vested remainder of any such trust upon its expiration to execution for the debts of the remainderman. [1999 c 42 § 312.]

11.96A.200 Appellate review. An interested party may seek appellate review of a final order, judgment, or decree of the court respecting a judicial proceeding under this title. The review must be done in the manner and way provided by law for appeals in civil actions. [1999 c 42 § 313.]

11.96A.210 Purpose. The purpose of RCW 11.96A.220 through 11.96A.250 is to provide a binding nonjudicial procedure to resolve matters through written agreements among the parties interested in the estate or trust. The procedure is supplemental to, and may not derogate fi any other proceeding or provision authorized by statute o common law. [1999 c 42 § 401.]

11.96A.220 Binding agreement. RCW 11.96A. through 11.96A.250 shall be applicable to the resolutio any matter, as defined by RCW 11.96A.030, other than n ters subject to chapter 11.88 or 11.92 RCW, or a trust fc minor or other incapacitated person created at its inception the judgment or decree of a court unless the judgment decree provides that RCW 11.96A.210 through 11.96A.2 shall be applicable. If all parties agree to a resolution of a such matter, then the agreement shall be evidenced by a wr ten agreement signed by all parties. Subject to the provisio of RCW 11.96A.240, the written agreement shall be bindi and conclusive on all persons interested in the estate or trus The agreement shall identify the subject matter of the dispu and the parties. If the agreement or a memorandum of th agreement is to be filed with the court under RCV 11.96A.230, the agreement may, but need not, include provi sions specifically addressing jurisdiction, governing law, th waiver of notice of the filing as provided in RCW 11.96A.230, and the discharge of any special representative who has acted with respect to the agreement.

If a party who virtually represents another under RCW 11.96A.120 signs the agreement, then the party's signature constitutes the signature of all persons whom the party virtually represents, and all the virtually represented persons shall be bound by the agreement. [1999 c 42 § 402.]

11.96A.230 Entry of agreement with court—Effect. (1) Any party, or a party's legal representative, may file the written agreement or a memorandum summarizing the written agreement with the court having jurisdiction over the estate or trust. The agreement or a memorandum of its terms may be filed within thirty days of the agreement's execution by all parties only with the written consent of the special representative. The agreement or a memorandum of its terms may be filed after a special representative has commenced a proceeding under RCW 11.96A.240 only after the court has determined that the special representative has adequately represented and protected the parties represented. Failure to complete any action authorized or required under this subsection does not cause the written agreement to be ineffective and the agreement is nonetheless binding and conclusive on all persons interested in the estate or trust.

(2) On filing the agreement or memorandum, the agreement will be deemed approved by the court and is equivalent to a final court order binding on all persons interested in the estate or trust. [2001 c 14 § 2; 1999 c 42 § 403.]

11.96A.240 Judicial approval of agreement. Within thirty days of execution of the agreement by all parties, the special representative may note a hearing for presentation of the written agreement to a court of competent jurisdiction. The special representative shall provide notice of the time and date of the hearing to each party to the agreement whose address is known, unless such notice has been waived. Proof of mailing or delivery of the notice must be filed with the court. At such hearing the court shall review the agreement

bursement for each estate, trust, or beneficiary whose income taxes are reduced must be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income. [2002 c 345 § 506.]

ARTICLE 6
MISCELLANEOUS PROVISIONS

11.104A.900 Uniformity of application and construction. In applying and construing chapter 345, Laws of 2002, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact similar laws. [2002 c 345 § 602.]

11.104A.901 Application of chapter 11.96A RCW. Nothing in chapter 345, Laws of 2002 is intended to restrict the application of chapter 11.96A RCW to issues, questions, or disputes that arise under or that relate to chapter 345, Laws of 2002. Any and all such issues, questions, or disputes shall be resolved judicially or nonjudicially under chapter 11.96A RCW. [2002 c 345 § 603.]

11.104A.902 Severability—2002 c 345. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [2002 c 345 § 604.]

11.104A.903 Captions, article and part headings not law—2002 c 345. Captions, article headings, and part headings used in this chapter are not any part of the law. [2002 c 345 § 605.]

11.104A.904 Effective date—2002 c 345. This act takes effect January 1, 2003. [2002 c 345 § 606.]

11.104A.905 Application of act to existing trusts and estates. Except as specifically provided otherwise in the terms of a trust or a will, chapter 345, Laws of 2002 shall apply to any receipt or expense received or incurred on or after January 1, 2003, by any trust or decedent's estate, whether established before, on, or after January 1, 2003, and whether the asset involved was acquired by the fiduciary before, on, or after January 1, 2003. [2002 c 345 § 607.]

Chapter 11.106 RCW
TRUSTEES' ACCOUNTING ACT

Sections

11.106.010 Scope of chapter—Exceptions. This chapter does not apply to resulting trusts, constructive trusts, business trusts where certificates of beneficial interest are issued to the beneficiaries, investment trusts, voting trusts, insurance trusts prior to the death of the insured, trusts in the nature of mortgages or pledges, trusts created by judgment or decree of a federal court or of the superior court when not sitting in probate, liquidation trusts or trusts for the sole purpose of paying dividends, interest or interest coupons, salaries, wages or pensions; nor does this chapter apply to personal representatives. [1985 c 30 § 95. Prior: 1984 c 149 § 128; 1955 c 33 § 30.30.010; prior: 1951 c 226 § 10. Formerly RCW 30.30.010.]

Short title—Application—Purpose—Severability—1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability—Effective dates—1984 c 149: See notes following RCW 11.02.005.

11.106.020 Trustee's annual statement. The trustee or trustees appointed by any will, deed, or agreement executed shall mail or deliver at least annually to each adult income trust beneficiary a written itemized statement of all current receipts and disbursements made by the trustee of the funds of the trust both principal and income, and upon the request of any such beneficiary shall furnish the beneficiary an itemized statement of all property then held by that trustee, and may also file any such statement in the superior court of the county in which the trustee or one of the trustees resides. [1985 c 30 § 96. Prior: 1984 c 149 § 129; 1955 c 33 § 30.30.020; prior: 1951 c 226 § 2. Formerly RCW 30.30.020.]

Short title—Application—Purpose—Severability—1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability—Effective dates—1984 c 149: See notes following RCW 11.02.005.

Trust provisions may relieve trustee from duty, restriction, or liability imposed by statute: RCW 11.97.010.

11.106.030 Intermediate and final accounts—Contents—Filing. In addition to the statement required by RCW 11.106.020 any such trustee or trustees whenever it or they so desire, may file in the superior court of the county in which the trustees or one of the trustees resides an intermediate account under oath showing:

(1) The period covered by the account;

(2) The total principal with which the trustee is chargeable according to the last preceding account or the inventory if there is no preceding account;

(3) An itemized statement of all principal funds received and disbursed during such period;

(4) An itemized statement of all income received and disbursed during such period, unless waived;

(5) The balance of such principal and income remaining at the close of such period and how invested;

(6) The names and addresses of all living beneficiaries, including contingent beneficiaries, of the trust, and a statement as to any such beneficiary known to be under legal disability;

(7) A description of any possible unborn or unascertained beneficiary and his interest in the trust fund.

After the time for termination of the trust has arrived, the trustee or trustees may also file a final account in similar

(h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross claim in accordance with the provisions of rules 19 and 20.

(i) Separate Trials; Separate Judgment. If the court orders separate trials as provided in rule 42(b), judgment on a counterclaim or cross claim may be rendered in accordance with the terms of rule 54(b), even if the claims of the opposing party have been dismissed or otherwise disposed of.

(j) Setoff Against Assignee. The defendant in a civil action upon a contract express or implied, other than upon a negotiable promissory note or bill of exchange, negotiated in good faith and without notice before due, which has been assigned to the plaintiff, may set off a demand of a like nature existing against the person to whom he was originally liable, or any assignee prior to the plaintiff, of such contract, provided such demand existed at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of such assignment, and was such a demand as might have been set off against such person to whom he was originally liable, or such assignee while the contract belonged to him.

(k) Other Setoff Rules. [Reserved. See RCW 4.32.120 through 4.32.150 and RCW 4.56.050 through 4.56.075.]

RULE 14. THIRD PARTY PRACTICE

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third party plaintiff need not obtain leave to make the service if he files the third party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall make his defenses to the third party plaintiff's claim as provided in rule 12 and his counterclaims against the third party plaintiff and cross claims against other third party defendants as provided in rule 13. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert his defenses as provided in rule 12 and his counterclaims and cross-claims as provided in rule 13. Any party may move to strike the third party claim, or for its severance or separate trial. A third party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) Tort Cases. This rule shall not be applied in tort cases, to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract directly liable to the person injured or damaged.

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend, the party's pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend, the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated "proposed" and unsigned, shall be attached to the motion. If a motion to amend is granted, the moving party shall thereafter file the amended pleading and, pursuant to rule 5, serve a copy thereof on all other parties. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original

pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

(e) Interlineations. No amendments shall be made to any pleading by erasing or adding words to the original on file, without first obtaining leave of court.

[Amended effective September 1, 2005.]

RULE 16. PRETRIAL PROCEDURE AND FORMULATING ISSUES

(a) Hearing Matters Considered. By order, or on the motion of any party, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) Such other matters as may aid in the disposition of the action.

(b) Pretrial Order. The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.

4. PARTIES (Rules 17–25)

RULE 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

(–) Designation of Parties. The party commencing the action shall be known as the plaintiff, and the opposite party as the defendant.

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or Be Sued. [Reserved.]

(c) Infants, or Incompetent Persons.

(1) *Scope.* Generally this rule does not affect statutes and rules concerning the capacity of infants and incompetents to sue or be sued.

(2) *Guardian Ad Litem for Infant.* [Reserved. See RCW 4.08.050.]

(3) *Guardian Ad Litem for Incompetents.* [Reserved. See RCW 4.08.060.]

(d) Actions on Assigned Choses in Action. [Reserved. See RCW 4.08.080.]

(e) Public Corporations.

(1) *Actions By.* [Reserved. See RCW 4.08.110.]

(2) *Actions Against.* [Reserved. See RCW 4.08.120.]

(f) Tort Actions Against State. [Reserved. See RCW 4.92.]

RULE 18. JOINDER OF CLAIMS AND REMEDIES

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross claim, or third party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.

(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In

particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

RULE 19. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons joinable under (1) or (2) of section (a) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of rule 23.

(e) Husband and Wife Must Join—Exceptions. [Reserved. See RCW 4.08.030.]

[Amended effective July 1, 1980.]

RULE 20. PERMISSIVE JOINDER OF PARTIES

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of these persons will arise in the action. All persons may be joined in one action as defendant if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

(c) When Husband and Wife May Join. [Reserved. See RCW 4.08.040.]

(d) Service on Joint Defendants; Procedure After Service. When the action is against two or more defendants and the summons is served on one or more but not on all of them, the plaintiff may proceed as follows:

(1) If the action is against the defendants jointly indebted upon a contract, he may proceed against the defendants served unless the court otherwise directs; and if he recovers judgment it may be entered against all the defendants thus jointly indebted so far only as it may be enforced against the joint property of all and the separate property of the defendants served.

(2) If the action is against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants.

(3) Though all the defendants may have been served with the summons, judgment may be taken against any of them severally, when the plaintiff would be entitled to judgment against such defendants if the action had been against them alone.

(e) Procedure to Bind Joint Debtor. [Reserved. See RCW 4.68.]

[Amended effective July 1, 1980.]

RULE 21. MISJOINDER AND NONJOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

RULE 22. INTERPLEADER

(a) Rule. Persons having claims against the plaintiff may be joined as defendants and required to interplead

SUPERIOR COURT GUARDIAN AD LITEM RULES (GALR)

Including Amendments Received Through October 1, 2005

Table of Rules

RULE 1. SCOPE AND DEFINITIONS

(a) Statement of Purpose and Scope of Rule. The purpose of these rules is to establish a minimum set of standards applicable to all superior court cases where the court appoints a guardian ad litem or any person to represent the best interest of a child, an alleged incapacitated person, or an adjudicated incapacitated person pursuant to Title 11, 13 or 26 RCW.

These rules shall also apply to guardians ad litem appointed pursuant to RCW 4.08.050 and RCW 4.08.060, if the appointment is under the procedures of Titles 11, 13 or 26 RCW.

These rules shall not be applicable to guardians ad litem appointed pursuant to Special Proceedings Rule (SPR) 98.16W and chapter 11.96A RCW.

(b) Definitions. As used in this rule, the following terms have these meanings:

(1) *Court.* Court shall mean any superior court in the State of Washington and all divisions thereof.

(2) *Guardian ad Litem.* Guardian ad litem shall mean any person or program appointed in a Title 11, 13, or 26 RCW action under the Revised Code of Washington to represent the best interest of a child, an alleged incapacitated person, or an adjudicated incapacitated person. The term guardian ad litem shall not include an attorney appointed to represent a party.

(3) *Judge.* Judge shall mean a judicial officer of the superior court, including commissioners and judges *pro tempore*.

(4) *Registry.* Registry shall mean the list of people authorized by the court to serve as guardians ad litem or CASA programs authorized by RCW 26.12.175.

[Adopted effective November 27, 2001.]

RULE 2. GENERAL RESPONSIBILITIES OF GUARDIAN AD LITEM

Consistent with the responsibilities set forth in Titles 11, 13, and 26 of the Revised Code of Washington and other applicable statutes and rules of court, in every

case in which a guardian ad litem is appointed, the guardian ad litem shall perform the responsibilities set forth below. For purposes of these rules, a guardian ad litem is any person who is appointed by the court to represent the best interest of the child(ren), an adjudicated incapacitated person, or an alleged incapacitated person or to assist the court in determining the best interest of the child(ren), an adjudicated incapacitated person, or an alleged incapacitated person, regardless of that person's title, except a person appointed pursuant to rule 6.

(a) Represent best interests. A guardian ad litem shall represent the best interests of the person for whom he or she is appointed. Representation of best interests may be inconsistent with the wishes of the person whose interest the guardian ad litem represents. The guardian ad litem shall not advocate on behalf of or advise any party so as to create in the mind of a reasonable person the appearance of representing that party as an attorney.

(b) Maintain independence. A guardian ad litem shall maintain independence, objectivity and the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom.

(c) Professional conduct. A guardian ad litem shall maintain the ethical principles of the rules of conduct set forth in these rules and is subject to discipline under local rules established pursuant to rule 7 for violation.

(d) Remain qualified for the registry. Unless excepted by statute or court rule, a guardian ad litem shall satisfy all training requirements and continuing education requirements developed for Titles 13 and 26 RCW guardians ad litem by the administrator of the courts and for Title 11 RCW guardians ad litem as required by statute and maintain qualifications to serve as guardian ad litem in every county where the guardian ad litem is listed on the registry for that county and in which the guardian ad litem serves and shall promptly advise each such court of any grounds for disqualification or unavailability to serve.

(e) Avoid conflicts of interests. A guardian ad litem shall avoid any actual or apparent conflict of interest or impropriety in the performance of guardian ad litem responsibilities. A guardian ad litem shall avoid self-dealing or association from which a guardian ad litem might directly or indirectly benefit, other than for compensation as guardian ad litem. A guardian ad litem shall take action immediately to resolve any potential conflict or impropriety. A guardian ad litem shall advise the court and the parties of action taken, resign from the matter, or seek court direction as may be necessary to resolve the conflict or impropriety. A guardian ad litem shall not accept or maintain appointment if the performance of the duties of guardian ad litem may be materially limited by the guardian ad litem's responsibilities to another client or a third person, or by the guardian ad litem's own interests.

(f) Treat parties with respect. A guardian ad litem is an officer of the court and as such shall at all times treat the parties with respect, courtesy, fairness and good faith.

(g) Become informed about case. A guardian ad litem shall make reasonable efforts to become informed about the facts of the case and to contact all parties. A guardian ad litem shall examine material information and sources of information, taking into account the positions of the parties.

(h) Make requests for evaluations to court. A guardian ad litem shall not require any evaluations or tests of the parties except as authorized by statute or court order issued following notice and opportunity to be heard.

(i) Timely inform the court of relevant information. A guardian ad litem shall file a written report with the court and the parties as required by law or court order or in any event not later than 10 days prior to a hearing for which a report is required. The report shall be accompanied by a written list of documents considered or called to the attention of the guardian ad litem and persons interviewed during the course of the investigation.

(j) Limit duties to those ordered by court. A guardian ad litem shall comply with the court's instructions as set out in the order appointing a guardian ad litem, and shall not provide or require services beyond the scope of the court's instruction unless by motion and on adequate notice to the parties, a guardian ad litem obtains additional instruction, clarification or expansion of the scope of such appointment.

(k) Inform individuals about role in case. A guardian ad litem shall identify himself or herself as a guardian ad litem when contacting individuals in the course of a particular case and inform individuals contacted in a particular case about the role of a guardian ad litem in the case at the earliest practicable time. A guardian ad litem shall advise information sources that the documents and information obtained may become part of court proceedings.

(l) Appear at hearings. The guardian ad litem shall be given notice of all hearings and proceedings. A guardian ad litem shall appear at any hearing for which the duties of a guardian ad litem or any issues substantially within a guardian ad litem's duties and scope of appointment are to be addressed. In Title 11 RCW proceedings, the guardian ad litem shall appear at all hearings unless excused by court order.

(m) Ex parte communication. A guardian ad litem shall not have ex parte communications concerning the case with the judge(s) and commissioner(s) involved in the matter except as permitted by court rule or by statute.

(n) Maintain privacy of parties. As an officer of the court, a guardian ad litem shall make no disclosures about the case or the investigation except in reports to the court or as necessary to perform the duties of a guardian ad litem. A guardian ad litem shall maintain the confidential nature of identifiers or addresses where

there are allegations of domestic violence or risk to a party's or child's safety. The guardian ad litem may recommend that the court seal the report or a portion of the report of the guardian ad litem to preserve the privacy, confidentiality, or safety of the parties or the person for whom the guardian ad litem was appointed. The court may, upon application, and under such conditions as may be necessary to protect the witnesses from potential harm, order disclosure or discovery that addresses the need to challenge the truth of the information received from the confidential source.

(o) Perform duties in timely manner. A guardian ad litem shall perform responsibilities in a prompt and timely manner, and, if necessary, request timely court reviews and judicial intervention in writing with notice to parties or affected agencies.

(p) Maintain documentation. A guardian ad litem shall maintain documentation to substantiate recommendations and conclusions and shall keep records of actions taken by the guardian ad litem. Except as prohibited or protected by law, and consistent with rule 2(n), this information shall be made available for review on written request of a party or the court on request. Costs may be imposed for such requests.

(q) Keep records of time and expenses. A guardian ad litem shall keep accurate records of the time spent, services rendered, and expenses incurred in each case and file an itemized statement and accounting with the court and provide a copy to each party or other entity responsible for payment. The court shall make provisions for fees and expenses pursuant to statute in the Order Appointing Guardian ad Litem or in any subsequent order.

[Adopted effective November 27, 2001.]

RULE 3. ROLES AND RESPONSIBILITIES OF GUARDIAN AD LITEM IN TITLE 13 RCW JUVENILE COURT PROCEEDINGS

In addition to the roles and responsibilities enumerated in rule 2, a guardian ad litem in Title 13 RCW juvenile court proceedings shall have the following responsibilities:

(a) Role. Unless otherwise specified in the order of appointment, the roles and responsibilities of a guardian ad litem are those roles and responsibilities specified in RCW 13.34.105 and applicable court rules.

(b) Explore concurrent planning. A guardian ad litem shall explore concurrent planning and make a timely recommendation to the court for a permanent plan for the child.

[Adopted effective November 27, 2001.]

RULE 4. AUTHORITY OF GUARDIAN AD LITEM

As an officer of the court, a guardian ad litem has only such authority conferred by the order of appointment. Consistent with the roles and responsibilities set forth in rules 2 and 3, and the grievance procedures set forth in rules 5 and 6, a guardian ad litem shall have the following authority:

(a) Access to party. Unless circumstances warrant otherwise, a guardian ad litem shall have access to the persons for whom a guardian ad litem is appointed and to all information relevant to the issues for which a guardian ad litem was appointed. The access of a guardian ad litem to the child or alleged incapacitated person and all relevant information shall not be unduly restricted by any person or agency. When the guardian ad litem seeks contact with a party who is represented by an attorney, the guardian ad litem shall notify the attorney in advance of such contact. The guardian ad litem's contact with the represented party shall be as permitted by the party's attorney, unless otherwise ordered by the court.

(b) Timely receipt of case documents. Until discharged by court order a guardian ad litem shall be timely furnished copies of all relevant pleadings, documents, and reports by the party which served or submitted them.

(c) Timely notification. A guardian ad litem shall be timely notified of all court hearings, administrative reviews, staffings, investigations, dispositions, and other proceedings concerning the case by the person or agency scheduling the proceeding.

(d) Notice of proposed agreements. A guardian ad litem shall be given notice of, and an opportunity to indicate his or her agreement or objection to any proposed agreed order of the parties governing issues substantially related to the duties of a guardian ad litem.

(e) Participate in all proceedings. Consistent with rule 2(*l*), a guardian ad litem shall participate in court hearings through submission of written and supplemental oral reports and as otherwise authorized by statute and court rule.

(f) Access to records. Except as limited by law or unless good cause is shown to the court, upon receiving a copy of the order appointing a guardian ad litem, any person or agency, including but not limited to any hospital, school, child care provider, organization, department of social and health services, doctor, health care provider, mental health provider, chemical health program, psychologist, psychiatrist, or law enforcement agency, shall permit a guardian ad litem to inspect and copy any and all records and interview personnel relating to the proceeding for which a guardian ad litem is appointed.

(g) Access to court files. Within the scope of appointment, a guardian ad litem shall have access to all superior court and all juvenile court files. Access to sealed or confidential files shall be by separate order. A guardian ad litem's report shall inform the court and parties if the report contains information from sealed or confidential files. The clerk of court shall provide certified copies of the order of appointment to a guardian ad litem upon request and without charge.

object to the participation of all the lawyers involved; and the total fee is reasonable.

[Amended effective September 1, 1990; amendment to RPC(c)(2) effective September 18, 1990, suspended September 18, 1990; suspension lifted December 12, 1990.]

RULE 1.6 CONFIDENTIALITY

(a) A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in sections (b) and (c).

(b) A lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime; or

(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, to respond to allegations in any proceeding concerning the lawyer's representation of the client, or pursuant to court order.

(c) A lawyer may reveal to the tribunal confidences or secrets which disclose any breach of fiduciary responsibility by a client who is a guardian, personal representative, receiver, or other court appointed fiduciary.

[Amended effective September 1, 1990.]

RULE 1.7 CONFLICT OF INTEREST; GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure).

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) For purposes of this rule, when a lawyer who is not a public officer or employee represents a discrete governmental agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented, and not the broader governmental entity of which the agency or unit is a part, unless:

(1) Otherwise provided in a written agreement between the lawyer and the governmental agency or unit; or

(2) The broader governmental entity gives the lawyer timely written notice to the contrary, in which case the client shall be designated by such entity. Notice under this subsection shall be given by the person designated by law as the chief legal officer of the broader governmental entity, or in the absence of such designation, by the chief executive officer of the entity.

[Amended effective September 1, 1995.]

RULE 1.8 CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS; CURRENT CLIENT

A lawyer who is representing a client in a matter:

(a) Shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) The client consents thereto.

(b) Shall not use information relating to representation of a client to the disadvantage of the client unless the client consents in writing after consultation.

(c) Shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Shall not, prior to the conclusion of representation of a client, make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) Shall not, while representing a client in connection with contemplated or pending litigation, advance or guarantee financial assistance to his or her client, except that:

(1) A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses; and

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in section (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) The lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) The client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by rule 1.6.

TITLE 3. ADVOCATE

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RULE 3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by rule 1.6;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(4) Offer evidence that the lawyer knows to be false.

(b) The duties stated in section (a) continue to the conclusion of the proceeding.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by rule 1.6.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with rule 1.15.

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

(g) Constitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this rule.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be

the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of rules 3.3(a) through (e), 3.4(a) through (c), and 3.5.

TITLE 4. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6.

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with rule 1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.

[Amended effective October 29, 2002.]

RULE 4.3 DEALING WITH UNREPRESENTED PERSON

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with rule 1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written, notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.

[Amended effective October 29, 2002.]

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSON

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

TITLE 5. LAW FIRMS AND ASSOCIATIONS

RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

ing charge of settlement of any estate, applies to the court for an order allowing a claim to be compromised and settled for less than its face value, the court shall appoint a day not less than 5 days after such application for hearing the same, unless for good cause shown less time should intervene, and direct the giving of such notice as may be deemed proper.

[Amended effective September 1, 1989.]

RULE 98.10W ESTATES—RECEIVERSHIP—REPORTS

All reports of receivers which involve an accounting shall be filed at least 10 days before the hearing. On filing and presentation of such report the court will appoint a time for hearing the same, and will direct such notice to be given as will most likely advise all interested parties of such hearing.

RULE 98.12W ESTATES GENERALLY—FEES

Before compensation shall be allowed to any personal representative, guardian, or attorney in connection with any probate matter or proceeding, or to any receiver or an attorney for a receiver, and before any agreement therefor shall be approved, the amount of compensation claimed shall be definitely and clearly set forth in the application therefor, and all parties interested in the matter shall be given notice of the amount claimed in such manner as shall be fixed by statute, or, in the absence of statute, as shall be directed by the court; unless such application be filed with or made a part of a report or final account of such personal representative, guardian, receiver, or attorney.

[Amended effective September 1, 1989.]

RULE 98.16W ESTATES—GUARDIANSHIP—SETTLEMENT OF CLAIMS OF MINORS AND INCAPACITATED PERSONS

(a) Approval of Settlement Required. In every settlement of a claim, whether or not filed in court, involving the beneficial interest of an unemancipated minor or a person determined to be disabled or incapacitated under RCW 11.88, the court shall determine the adequacy of the proposed settlement on behalf of such affected person and reject or approve it. If a suit for recovery on behalf of the affected person has been previously maintained, then the petition shall be filed in that county, or if no such suit exists, then in the county where the affected person resides, unless either court orders otherwise.

(b) Petition. The petition for approval of settlement on behalf of the affected person shall contain, as a minimum and to the full extent known:

(1) the affected person's full name and date of birth;

(2) the general identification and relationship of others having claims or potential claims arising from the same matters and identity of their counsel;

(3) the description and amount of all liens, subrogation or reimbursement claims, fees, bills, costs or expenses connected with the affected person's claim;

(4) the description and amount of all liens, reimbursements, fees, costs or expenses requested to be paid from the settlement funds to be deposited with the court (or the maximum claimed for reimbursement if any item is being disputed or negotiated further), including a columnar listing of all amounts to be received, all amounts to be paid or the maximum claimed and concluding with the net amount of money or other property remaining for the affected person.

(c) Appointment, Role and Termination of the Settlement Guardian ad Litem; Exceptions to Appointment.

(1) Upon filing of the petition, the court shall appoint a Settlement Guardian ad Litem to assist the court in determining the adequacy of the proposed settlement. The Settlement Guardian ad Litem shall conduct an investigation and file a written report with the court with recommendation regarding approval and final disposition within 45 days of appointment or such other time as the court may order. The court, if appropriate under existing law, may order that all or part of the report and contents shall be confidential or sealed. Upon filing of the report and appearing at hearings as may be required, the Settlement Guardian ad Litem is exonerated from further duties unless otherwise ordered by the court.

(2) The court may dispense with the appointment of the Settlement Guardian ad Litem if by written finding the court determines a guardian ad litem, a guardian, or limited guardian has been previously appointed or if the court affirmatively finds that the affected person is represented by independent counsel, so long as the guardian ad litem, guardian, limited guardian, or independent counsel has the qualifications which would be required for a Settlement Guardian ad Litem and neither has nor represents interests in conflict with those of the affected person which would not be allowed for a Settlement Guardian ad Litem. Independent counsel's fee interest in the claim, if allowed by the Rules of Professional Conduct, is not a disqualifying interest. If a Settlement Guardian ad Litem is not required, the independent counsel, guardian ad litem, guardian or limited guardian shall file the report.

(d) Qualifications of Settlement Guardian ad Litem. The Settlement Guardian ad Litem shall be an attorney with at least five years of pertinent legal experience and such other qualifications as the court may require. The Settlement Guardian ad Litem shall neither have nor represent any interest in conflict with the affected person, including but not limited to the conflicting interests of parents or others legally responsible for medical care of the affected person.

(e) Report of Settlement Guardian ad Litem. The report of the Settlement Guardian ad Litem or other person authorized above shall include a description, in

depth appropriate to the magnitude of injuries and settlement, of at least:

(1) the background of the appointment and qualifications of the writer including any relationship with involved parents, guardians, insurers or attorneys;

(2) a description of the investigation conducted, the persons interviewed and the documents reviewed, if any;

(3) a description of the incident and the affected person's potential legal claims;

(4) a description of the affected person's injuries, general treatment, diagnosis and prognosis attaching a recent supporting medical report or office record;

(5) a discussion of the damages potentially recoverable including identification of all special damages;

(6) a discussion of the potential liability of all persons and entities;

(7) an identification of other insurance or collateral sources for payment of any bills or expenses;

(8) a discussion and recommendation regarding any lien, subrogation or reimbursement claims, including any suggested retention of an attorney's trust account of the full amount claimed until the final resolution of such claim;

(9) an identification of all other claims, specifically including any claims held by other family members;

(10) a discussion of any proposed apportionment of claim proceeds among family members or unrelated claimants, if any;

(11) a discussion and recommendation regarding the proposed settlement form, documents and amounts;

(12) a discussion and recommendation regarding the expenses and fees for which payment is requested;

(13) a discussion and recommendation regarding the requested disposition of net proceeds;

(14) a statement of time spent, expenditures made and the fees and costs requested by the Settlement Guardian ad Litem;

(15) a discussion and recommendation regarding the presence of the affected person and the Settlement Guardian ad Litem at any court hearings on the Petition;

(16) a statement as to whether the Petition has been submitted for approval in any other jurisdiction.

(f) At the time the petition for approval of the settlement is heard, the allowance and taxation of all fees, costs, and other charges incident to the settlement shall be considered and disposed of by the court. The court by local rule or by specific direction, may require or waive the presence of the affected person or the Settlement guardian ad Litem.

(g) Attorney's Fees and Costs. Any attorney claiming fees, costs or other charges incident to representation of the affected person, from the claim proceeds or otherwise, shall file an affidavit or declaration under RCW 9A.72.085 in support thereof. Copies of any written fee agreements must be attached to the affidavit or declaration.

(h) Deposit in Court and Disbursements. Except for any structured portion of a settlement, the total judgment or total settlement shall be paid into the registry of the court, or as otherwise ordered by the court. All sums deductible therefrom, including costs, attorney's fees, hospital and medical expenses, and any other expense, shall be paid upon approval of the court.

(i) Form for Payment of Remaining Funds. Checks for funds payable to the affected person may be made out by the clerk jointly to the depository bank, trust company, or insured financial institution and to the independent attorney for the affected person, guardian or limited guardian, or trustee, and deposit shall be made to the trust or into a blocked account for the affected person with provision that withdrawals cannot be made except as provided in the trust instrument or as ordered by the court. A deposit receipt to that effect must timely be filed with the court by the payee.

(j) Control and Orders for Remaining Funds. In calculating the amount remaining from a structured settlement, if the settlement required court approval only because the affected person was an unemancipated minor, then only the payments received and to be received before attaining majority age are counted. All orders directing funds to a blocked account should recite that the funds are payable upon further order of the court or to the affected person at his or her age of majority, which date should be specified. Upon approval of settlement and payment of all authorized fees, bills and expenses, the court shall order one of the following actions:

(1) *$25,000 or Less.* If the money or the value of other property remaining after deduction for all approved fees, bills and expenses is $25,000 or less, the court shall require that:

(A) the money be deposited in a bank or trust company or be invested in an account in an insured financial institution for the benefit of the affected person, subject to withdrawal only upon the order of the court as a part of the original proceeding; or

(B) the money or property be paid to a duly appointed and qualified guardian or limited guardian; or

(C) the money be placed in trust, subject to the conditions set forth in subsection (3).

(2) *More than $25,000.* If the money or the value of other property remaining after deduction for all approved fees, bills and expenses exceeds $25,000, the court in the order or judgment shall:

(A) if there is an existing or newly created guardian or limited guardian who approves, require that the money be deposited in a bank or trust company or be invested in an account in an insured financial institution for the benefit of the affected person,

subject to withdrawal only upon the order of the court handling the guardianship or limited guardianship;

(B) if there is no guardian or limited guardian of the affected person or no approval under (A), the court in the order or judgment shall require that either a guardian or limited guardian be appointed, or

(C) the money or other property be placed in trust, subject to the conditions set forth in subsection (3).

(3) *Conditions for Use of Trust.* A trust established pursuant to this rule under subsection (1) or (2) must meet the following requirements:

(A) The selection of the trustee(s) and the terms of the trust shall be subject to the court's approval;

(B) No family member of the affected person, or other potential residual beneficiary of the trust, shall be approved by the court as a sole trustee;

(C) A bonded or insured fiduciary shall be designated as sole trustee or as co-trustee with principal responsibility for financial management of the trust estate;

(D) The fiduciary shall prepare an annual statement of income, expenses, current assets, and fees charged; shall deliver the statement to any co-trustees, the beneficiary, and the beneficiary's personal representative; and shall present the statement for review and approval by the court having jurisdiction over the beneficiary;

(E) No family member or potential residual beneficiary who serves as a co-trustee shall exercise discretionary authority over individual expenditures from the trust that would bring direct or indirect benefit to that individual; and

(F) The administration of the trust shall be subject to the continuing jurisdiction of the appropriate court.

(k) Bond. Unless all funds are to be placed in a blocked account or court approved trust, sufficient bond shall be required for guardians and limited guardians to the extent required by guardianship law.

[Amended effective July 1, 1972; July 1, 1974; September 1, 1984; September 1, 1989; April 8, 1997.]

RULE 98.20W ESTATES—GUARDIANSHIPS—AUTHORIZATION OF EXPENDITURES [RESCINDED]

[Rescinded effective September 1, 1989.]

IN THE COURT OF APPEALS, DIVISION II
COUNTY OF PIERCE, STATE OF WASHINGTON

In re the Matter of: JOSEPH KWIATKOWSKI, Appellant, v. RALPH DREWS, JAMES FROST, SEATTLE FIRST NATIONAL BANK (BANK OF AMERICA), PUGET SOUND NATIONAL BANK (KEY TRUST COMPANY and US BANK TRUST DEPARTMENT, Respondents.	NO. 31738-9-II CERTIFICATE OF SERVICE OF BRIEF OF APPELLANT

I certify that on the 21st day of December, 2006 I served a copy of the Brief of Appellant (100 pages) on the following parties to this proceeding and their attorneys or authorized representatives, as listed below, via e-mail and ABC Legal Messenger.

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I declare under penalty of perjury according to the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of December, 2006.

Christine M. Buoy
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